support his claim for standing in a suit for negligence and implied breach of contract through analogy to defamation, intrusion upon seclusion, public disclosure of private facts, or any other opaque analogy to an obscure tort absent from the operative complaint.

Applicant Details

First Name	**Skylar**
Last Name	**Ruprecht**
Citizenship Status	**U. S. Citizen**
Email Address	**skylarruprecht@gmail.com**
Address	**Address** Street **161 W. Wisconsin Ave, Apt 315** City **Milwaukee** State/Territory **Wisconsin** Zip **53203** Country **United States**
Contact Phone Number	**4124969022**

Applicant Education

BA/BS From	**The College of Wooster**
Date of BA/BS	**May 2017**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 10, 2021**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Journal of Civil Rights and Civil Liberties**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Pennsylvania**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Mills, David
dmills@dmills.com
650-723-3842

Letter, Dean's
deansletter@law.stanford.edu
650-723-4455

Ludwig, Brett
Brett_Ludwig@wied.uscourts.gov

Hagan, Margaret
mdhagan@stanford.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

H. SKYLAR RUPRECHT
(412) 496-9022 • 161 W. Wisconsin Ave, Apt 315, Milwaukee, WI 53203 • skylar_ruprecht@wied.uscourts.gov

June 6, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, Vermont 05401

Dear Judge Robinson:

I am writing to apply for a 2024-25 clerkship in your chambers. I am a 2021 graduate of Stanford Law School, currently in the waning days of a two-year clerkship with District Court Judge Brett H. Ludwig of the Eastern District of Wisconsin.

I became particularly interested in clerking for you after reading an account of the 2022 Law Day lecture you gave at Dartmouth College. According to *The Dartmouth*, you described selecting cases like *Baker v. State of Vermont* and *Morgan v. Kroupa* (which I studied in my animal law class at Stanford) because they allowed you to illustrate a point while still being accessible. That resonated with me because, in drafting orders at the district court level, I have always tried to frame the relevant issues in a way that ties into the broader legal canon while also making the outcome understandable to the litigants involved. I think you admirably accomplished this in the admittedly complex case of *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*

Enclosed please find my resume, law school and undergrad transcripts, and writing sample for your review.

I welcome the opportunity to discuss my qualifications further. Thank you for your time and consideration.

Sincerely,

H. Skylar Ruprecht

H. SKYLAR RUPRECHT

(412) 496-9022 • 161 W. Wisconsin Ave., Apt. 315 Milwaukee, WI 53203 • skylar_ruprecht@wied.uscourts.gov

Bar Admission: Pennsylvania

EDUCATION

Stanford Law School, Stanford, CA — J.D. June 2021
Honors: Gerald Gunther Prize for Outstanding Performance in Criminal Law
Journal: *Stanford Journal of Civil Rights and Civil Liberties* (Vol. 16: Senior Editor)
Activities: Shaking the Foundations; Levin Center Public Interest Mentor/Fellow; Naturalization Pro Bono Project; Stanford Election Law Project; *The Stanford Daily*

The College of Wooster, Wooster, OH — B.A., *summa cum laude*, Philosophy, May 2017
Honors: Phi Beta Kappa, Phi Sigma Tau Philosophy Honor Society, Remy Johnston Memorial Prize in Philosophy, Honors Senior Thesis, Exemplar Status Senior Thesis, Departmental Honors
Activities: Student Government Association, Teaching Apprenticeship, *The Wooster Voice*, College Radio DJ

PUBLICATIONS

- "A Sellout," *The Piker Press*, May 16, 2022
- "Plurality of Nothing," *CC&D Literary Magazine*, Volumes 327 & 328, Nov-Dec 2022

WORK EXPERIENCE

Eastern District of Wisconsin – Judge Brett H. Ludwig — Milwaukee, WI
Judicial Law Clerk — August 2021 – Present
- Managed a docket of general civil cases and worked two trials.
- Drafted over 100 orders deciding motions to dismiss, motions to remand, motions for judgment on the pleadings, motions for class certification, motions for summary judgment, motions to suppress, petitions for writs of habeas corpus, Social Security appeals, and motions for attorney's fees.
- Researched law and prepared bench memos prior to motions hearings and oral arguments.

Office of the Federal Public Defender for the Eastern District of Virginia — Alexandria, VA
Legal Intern — June – August 2020
- Assisted the Office in its push to win compassionate release for indigent prisoners during the Covid-19 pandemic.
- Performed legal research and prepared memoranda on a wide range of criminal matters.

San José Mayor's Office — San José, CA
Policy Researcher—Stanford Design School and Policy Lab — September 2019 – May 2020
- Partnered with stakeholders to develop a comprehensive plan to increase the construction of Accessory Dwelling Units (ADUs) as a way to combat the city's affordable housing crisis.
- Surveyed members of the community to determine the biggest obstacles to ADU construction.
- Made a final policy proposal before local leaders.

Interests: Songwriting, weightlifting, road trips

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Ruprecht,Harrison S
Student ID : 06318681

Print Date: 02/02/2022

--------- Stanford Degrees Awarded ---------

Degree : Doctor of Jurisprudence
Confer Date : 06/13/2021
Plan : Law

--------- Academic Program ---------

Program : Law JD
09/24/2018 : Law (JD)
Plan
Status Completed Program

--------- Beginning of Academic Record ---------

2018-2019 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	4.00	4.00	P	
Instructor:		Spaulding, Norman W.				
LAW	205	CONTRACTS	4.00	4.00	P	
Instructor:		Morantz, Alison				
LAW	207	CRIMINAL LAW	4.00	4.00	H	
Instructor:		Mills, David W				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	P	
Instructor:		Alexander, Yonina				
LAW	223	TORTS	4.00	4.00	H	
Instructor:		Karlan, Pamela S				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2018-2019 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		McConnell, Michael				
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Anderson, Michelle W				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Dearborn, Meredith R				
LAW	2009	WHITE COLLAR CRIME	3.00	3.00	H	
Instructor:		Mills, David W				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 30.00

2018-2019 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	P	
Instructor:		Dearborn, Meredith R				
LAW	7010	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	3.00	H	
Instructor:		Schacter, Jane				
LAW	7084	THE FIRST AMENDMENT: FREEDOM OF SPEECH AND PRESS	3.00	3.00	P	
Instructor:		Persily, Nathaniel A.				
LAW	7086	TRANSITIONAL JUSTICE	3.00	3.00	H	
Instructor:		O'Connell, James				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 41.00

2019-2020 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	806Y	POLICY PRACTICUM: JUSTICE BY DESIGN: EVICTION	4.00	4.00	P	
Instructor:		Hagan, Margaret Darin Rhode, Deborah L Solomon, Jason M				
LAW	2403	FEDERAL COURTS	3.00	3.00	P	
Instructor:		Huq, Aziz Z.				
LAW	7051	LOCAL GOVERNMENT LAW	3.00	3.00	P	
Instructor:		Ford, Richard				
LAW	7846	ELEMENTS OF POLICY ANALYSIS	1.00	1.00	MP	
Instructor:		Herman, Luciana Louise				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 52.00

2019-2020 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	806Y	POLICY PRACTICUM: JUSTICE BY DESIGN: EVICTION	4.00	4.00	H	
Instructor:		Hagan, Margaret Darin Rhode, Deborah L Solomon, Jason M				
LAW	2013	UNITED STATES V. MILKEN: A CASE STUDY	2.00	2.00	H	
Instructor:		Mills, David W				
LAW	7059	LABOR LAW	3.00	3.00	MPH	
Instructor:		Gould IV, William B				
LAW	7078	THE UNITED STATES SENATE AS A LEGAL INSTITUTION	3.00	3.00	MPH	
Instructor:		Feingold, Russell				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Ruprecht,Harrison S
Student ID : 06318681

LAW TERM UNTS: 12.00 LAW CUM UNTS: 64.00

2019-2020 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1003	BANKRUPTCY	3.00	3.00	MPH	
Instructor:		Triantis, George Gregory				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	4.00	MPH	
Instructor:		Weisberg, Robert				
LAW	2402	EVIDENCE	4.00	4.00	MPH	
Instructor:		Sklansky, David A				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 75.00

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	5805	ANIMAL LAW	2.00	2.00	H	
Instructor:		Wagman, Bruce				
LAW	6001	LEGAL ETHICS	3.00	3.00	P	
Instructor:		Rhode, Deborah L				
LAW	7038	REMEDIES	3.00	3.00	P	
Instructor:		Lemley, Mark Alan				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 87.00

2020-2021 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	P	
Instructor:		Freeman Engstrom, David				
LAW	7849	MEDIATION BOOT CAMP	1.00	1.00	MP	
Instructor:		Dickstein, Michael E.				
PHIL	175W	PHILOSOPHY OF LAW: PROTEST, PUNISHMENT, AND RACIAL JUSTICE	4.00	4.00	CR	
Instructor:		Salkin, Wendy Suzanne				

LAW TERM UNTS: 8.00 LAW CUM UNTS: 95.00

2020-2021 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1001	ANTITRUST	4.00	4.00	P	
Instructor:		Van Schewick, Barbara				
LAW	3511	WRITING WORKSHOP: LAW AND CREATIVITY	3.00	3.00	H	
Instructor:		Canales, Viola Irene				
LAW	5014	INTERNATIONAL TRADE LAW	3.00	3.00	P	
Instructor:		Sykes, Alan				
LAW	6005	TECHNOLOGICAL, ECONOMIC AND BUSINESS FORCES TRANSFORMING THE PRIVATE PRACTICE OF LAW	2.00	2.00	H	
Instructor:		Yoon, James Chung-Yul				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 107.00

END OF TRANSCRIPT

Stanford Law School

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-2465
Fax 650 725-0253
info@law.stanford.edu
www.law.stanford.edu

Stanford Law School's Grading System

In the fall of 2008, Stanford Law School adopted the following grading system for all courses:

H	Honors	Exceptional work, significantly superior to the average performance at the school
P	Pass	Representing successful mastery of the course material
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory
F	Fail	Representing work that does not show minimally adequate mastery of the material
L	Pass	Student has passed the class. Exact grade yet to be reported
I	Incomplete	
N	Continuing Course	
[blank]		Grading Deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading Deadline has passed. Grade has yet to be reported.

In addition to the above grades, professors may award class prizes to recognize extraordinary performance in a particular course. These prizes are rare. No more than one prize may be awarded for every 15 students enrolled in the course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor. The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year Legal Research & Writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

Interpreting Stanford's Grades:
Grading policies vary significantly from school to school. Other schools that have a similar system impose no limits on the number of Honors grades awarded. As a result, one might see 70-80% of a class receiving Honors. Stanford Law School, by comparison, imposes strict limitations on the percentage of Honors grades that professors may award. These vary slightly depending on the class, but employers should expect to see approximately one-third of our students receiving Honors in any exam class. For this reason, we strongly encourage employers who use grades as part of their hiring criteria to set standards specifically for Stanford students, and to consider grades in the context of other information about a candidate, such as faculty recommendations, pre-law school academic and professional experience, law school activities, and an interviewer's own impressions of the individual.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter Quarter 2020 and all classes held during Spring Quarter 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

Updated May 2020

David W. Mills
Professor of the Practice of Law
Senior Lecturer in Law
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-3842
dmills@dmills.com

June 06, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing this letter in support of Skylar Ruprecht's application for a clerkship in your chambers. I got to know Skylar when he was a student in my Criminal Law, White Collar Crime, and U.S. v. Milken courses. During our interactions, I was most impressed with his writing ability and intellectual curiosity, and I am confident that he will be an excellent law clerk and a terrific attorney. I can fairly say that in these rather odd times, Skylar proved himself to be someone with an uncanny sense of getting to the real issues coupled with the courage of thought that is often lacking these days.

In 1L Criminal Law, Skylar distinguished himself as a uniquely inquisitive participant in class discussion. He frequently raised thought-provoking issues and helped push the discourse in a deeper and more enlightening direction. His final exam merely confirmed what his class participation suggested—that he had a strong ability to synthesize and apply the law and a knack for finding creative solutions to difficult legal dilemmas. He answered all questions thoroughly with clear and concise prose and ended up winning the class prize as having written one of the best final exam papers in the class. He continued to demonstrate very strong intellectual and personal abilities in my White Collar and US v Milken classes. I have no doubts about his intellectual capabilities or capacity to creatively navigate complex legal doctrines.

In addition, Skylar was always eager to voice his opinion and engage in respectful debate. Early on in his 1L year we had a particularly interesting conversation about whether Immanuel Kant's belief in retributive justice appropriately reflected Kantian moral philosophy. From this conversation, I learned that Skylar was someone who enjoyed hearing opposing viewpoints and took criticism as a means for improving his own arguments. This is just one example of many that I can recall, in which Skylar demonstrated fearless but thoughtful intellectual curiosity coupled with a willingness to hold his ground where appropriate. I think this skill will serve him especially well during a judicial clerkship. I really have treasured my time with Skylar and was sorry to see him leave as his leaving is a serious loss to the Law School community.

In short, I give my full recommendation to Skylar without reservation. He always brought a strong work ethic and unique perspective to class, and he will bring the same to your chambers. Please feel free to contact me with any further questions.

Sincerely,

/s/ David W. Mills

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

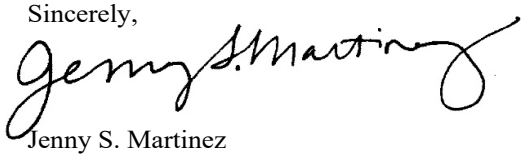
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

My name is Brett Ludwig, and I am a District Judge serving in the Eastern District of Wisconsin in Milwaukee. I am writing to recommend – **as highly as I can** – one of my current law clerks, Skylar Ruprecht, for a clerkship in your chambers. Skylar is a gifted young lawyer and the best law clerk I have ever had the good fortune to employ. In fact, his analytical and writing skills are the best I have seen in a young lawyer in my entire career, including more than two decades of private practice experience at a large law firm and seven years' service as a federal judge.

Skylar has the key attributes of a great law clerk: top-notch intellect, outstanding writing skills, and a great work ethic. His intelligence is reflected on his resume (*summa cum laude,* Phi Beta Kappa, Stanford Law School, etc.), but I can confirm he has practical and not just paper smarts. He also has a rare but wonderful intellectual curiosity about the law and has become my "go-to" law clerk for particularly difficult issues. Skylar is also a tremendously gifted writer. His draft decisions are clear and concise, well-beyond the level usually associated with a young lawyer. Perhaps most impressive is Skylar's productivity. In just over a year and a half in my chambers, he has helped draft more than *one hundred* substantive decisions. He has a real gift for quickly digesting briefs, sifting out the material issues, and producing a concise, high-quality first draft. He has been invaluable to me in working through a morass of old motions and cases that were reassigned to me when I took the bench.

Skylar is also a good person. While devoted to completing his assigned tasks promptly, he is a joy to have in chambers. His witty takes on our cases, current events, and daily chambers life are appreciated by my entire team, including my courtroom deputy and his co-clerks.

Skylar's immense talents and tremendous productivity have been apparent since he started with me in August 2021. At my urging, he is now considering appellate court clerkships. If you have any law clerk openings, you should hire Skylar. You will not regret it. In fact, he may be the best law clerk you ever hire.

If you have any questions, please call me at 414-297-3076.

Yours very truly,

BHL

Margaret Hagan
Director, Legal Design Lab
Lecturer in Law
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 498.1392
mdhagan@stanford.edu

June 06, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I would like to recommend Harrison Skylar Ruprecht for a clerkship. I have had the privilege to have worked with him as a teacher and supervisor during the past school year. I have been extremely impressed with his commitment to detailed legal research, creative problem-solving, and engagement with complex public policy issues.

At Stanford, I direct the Legal Design Lab, in which students, researchers, and technologists collaborate to research key needs within the civil justice system, and to develop new services and technologies that could improve court efficiency and litigants' ability to navigate the system. Skylar has been my student for the past 6 months, as part of the Law School policy lab class on Justice By Design: Evictions.

In the class, he worked on a two-person team that focused on possible eviction prevention policies in the Bay Area. He was given a broad mandate from our partner at the Judicial Council, to explore possible policy areas around eviction, and then Skylar and his team-mate conducted user research with tenants and landlords, along with legal and policy research, to focus on a particular policy challenge that the city of San Jose was considering around encouraging more homeowners to offer accessory dwelling units to the rental market.

Skylar has stood out as one of the top students in my class this year – quickly taking on a leadership role in the class environment and the project work. He brings an enormous amount of energy and insight to work on access to justice and empirical legal research. In the class, he helped build a partnership with the San Jose's mayor's office, develop an extensive survey on housing policy issues, and write an analysis and visual presentation of this survey for use by city leaders.

In the class, he showed his thoughtfulness, critical thinking, and constructive team relationships. He worked well with the mix of law students, policy students, engineering students, and others. Skylar thinks at the systems level, with understanding of complexities of how law and policy might interact, as well as paying close attention to details and texts. He was great to work with in class, with frequent and meaningful contributions to our conversations, and with good relationships with his peers in their many group project tasks.

His writing and presentation skills are very effective. The report that he wrote with his team-mate for the mayor's office was clear, detailed, and succinct. They also made a visual presentation to convey their findings with graphs, diagrams, and other visual techniques. Both the report and presentation were received very well by the partner groups, and they have been used in the city's policy-making work.

Skylar is intelligent, creative, and critical, with very strong leadership skills combined with good team and project management skills. He is hard-working and enjoyable to work with. His talents will make him an excellent law clerk, and I would recommend him strongly and without any reservation for a position in your office.

Please be in touch if there is any other way I can be helpful. You can call me directly at (650) 498-1392, or write at mdhagan@stanford.edu. Thank you for your attention!

Sincerely,

/s/ Margaret Hagan
Director, Stanford Legal Design Lab

H. SKYLAR RUPRECHT
(412) 496-9022 • 161 W. Wisconsin Ave, Apt 315, Milwaukee, WI 53203 • skylar_ruprecht@wied.uscourts.gov

The attached writing sample is a summary judgment order I drafted while clerking for Judge Brett H. Ludwig in the Eastern District of Wisconsin. I received permission from Judge Ludwig to use this order as a writing sample. This piece is almost entirely my own work, with a few edits adopted prior to docketing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANDREW L COLBORN,

Plaintiff,

Case No. 19-cv-0484-bhl

v.

NETFLIX INC, et al.,

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On December 18, 2015, Netflix released the ten-part docuseries *Making a Murderer* and turned small-town sergeant Andrew Colborn into a household name. He now very much wishes it had not. His unflattering portrayal in the series transformed his "15 minutes of fame" into what felt like a far longer period of *infamy*, as a mob of outraged viewers flooded his voicemail and email inboxes with vile and hostile messages. Some called him a crooked cop. Others wished him a long, unpleasant stay in fiery perdition. At least one person threatened to harm his family. Meanwhile, two thousand miles away, *Making a Murderer*'s producers were basking in accolades and consorting with major media outlets. Critics lauded their journalistic tenacity and unique ability to synthesize the legal and dramatic.[1] Colborn received no such flattery—as the producers took the stage at the Microsoft Theatre to accept their Emmys, he was busy boarding up the front door to his own house. Outraged by what he believed to be grossly unjust, inverted life trajectories, Colborn filed this lawsuit, accusing Netflix, Inc., Chrome Media LLC, and producers Laura Ricciardi and Moira Demos of defamation. All Defendants have moved for summary judgment. Colborn has also moved for partial summary judgment on 52 allegedly defamatory statements. The dispositive question is whether Colborn has produced sufficient evidence to make a defamation case out of his admittedly harsh portrayal. He has not. The First Amendment does not

[1] Mike Hale, *Review: 'Making a Murderer,' True Crime on Netflix*, N.Y. Times, (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/arts/television/review-making-a-murderer-true-crime-on-netflix.html?_r=0; Margaret Lyons, Making a Murderer *Is As Good As 'Serial' and* The Jinx*, If Not Better*, Vulture, (Dec. 17, 2015), https://www.vulture.com/2015/12/making-a-murderer-as-good-as-serial-if-not-better.html.

guarantee a public figure like Colborn the role of protagonist in popular discourse—in fact, it protects the media's ability to cast him in a much less flattering light—so Defendants are entitled to summary judgment on all counts.

FACTUAL BACKGROUND

Making a Murderer attempts to condense the tumultuous life of convicted murderer Steven Avery into roughly ten hours of narratively satisfying television. The series opens in 1985, when police arrested Avery, then only 23 years old but already well-acquainted with the criminal justice system, and charged him with the attempted murder, sexual assault, and false imprisonment of Penny Beerntsen. (ECF No. 326 at 1-2.) Though he professed his innocence, a jury accepted Beerntsen's eyewitness testimony and convicted Avery on all counts, and a judge sentenced him to 60 years in prison. (*Id.* at 2-3.)

About 10 years later, in 1994 or 1995, Andrew Colborn, a Manitowoc County Jail Corrections Officer, fielded a phone call from a detective in another jurisdiction. (*Id.* at 3.) The detective relayed that an inmate in the nearby Brown County jail had claimed responsibility for a sexual assault that Manitowoc County had ascribed to someone else. (*Id.*) Colborn transferred the call to the Detective Division and, consistent with his own limited position, took no further action. (ECF No. 346-1 at 24.) Other members of law enforcement would later testify that then-Manitowoc County Sheriff Tom Kocourek assured Colborn that authorities had "the right guy." (ECF No. 326 at 5.)

If the call Colborn received was indeed about Steven Avery, which seems likely but is not established, the Sheriff's assurances were utterly misplaced. Manitowoc County did not, in fact, have the right guy. In 2002, using DNA evidence, attorneys for the Wisconsin Innocence Project proved that Gregory Allen, not Avery, was the one behind Beerntsen's violent assault. (*Id.* at 3.) Thus, on September 11, 2003, 18 years after he was wrongfully convicted, Avery walked free. (*Id.*)

One day later, at his superior's request, Colborn—now a sergeant in the Manitowoc County Sheriff's Office—authored a statement regarding the phone call he had received eight or nine years prior. (ECF No. 323 at 4.) Manitowoc County delivered that statement to the Wisconsin Department of Justice, which reviewed it as part of its investigation into Sheriff Kocourek's and District Attorney Dennis Vogel's handling of the Beerntsen case. (ECF No. 326 at 4-5.) Wisconsin Attorney General Peg Lautenschlager ultimately chose not to charge Kocourek or

Vogel, (*id.* at 5), but that did not stop Avery from filing his own lawsuit against those he deemed responsible for his wrongful incarceration. (*Id.* at 6.) In 2004, he sued both the sheriff and DA, as well as Manitowoc County, for $36 million, alleging they had unconstitutionally withheld exculpatory evidence while he remained in prison. (*Id.*)

While Avery's civil suit was pending, Teresa Halbach, a 25-year-old professional photographer from Calumet County, Wisconsin, disappeared on business in Manitowoc. (*Id.* at 6.) On November 3, 2005, Halbach's family filed a missing person report, which investigators relayed to on-duty officers, including Sergeant Colborn. (*Id.* at 7.) As part of his investigation, Colborn visited Avery's Auto Salvage and spoke with Steven Avery himself. (*Id.*) He also called dispatch to confirm that the license plate SWH-582 corresponded to a 1999 Toyota registered to Halbach. (*Id.* at 8.) That 1999 Toyota proved critical to the investigation; on November 5, 2005, authorities discovered it on the curtilage of Avery's property. (*Id.* at 10.) With Avery now a prime suspect, police obtained a warrant to search his trailer and garage, which Colborn, Manitowoc County Deputy James Lenk, and Calumet County Deputy Dan Kucharski executed between November 5 and 8, 2005. (*Id.* at 12.)

On the final day of the search, in a fit of frustration, Colborn violently shook a bookcase located in Avery's bedroom. (*Id.* at 13.) Moments later, Lenk discovered the key to Halbach's Toyota lying on the floor. (*Id.*) The evidence against Avery then quickly began to mount. Not only did police find his DNA on the key, they also found both his and Halbach's blood inside her vehicle and retrieved her cremains from a burn pit on his property. (*Id.* at 13-14.) Now confident in his case, special prosecutor Ken Kratz officially charged Avery with homicide on November 15, 2005. (*Id.* at 11, 14.) Weeks later, graduate film students Laura Ricciardi and Moira Demos travelled to Manitowoc and commenced work on a project that would eventually become *Making a Murderer*. (*Id.* at 15.)

Avery went to trial on February 12, 2007 in Manitowoc County Circuit Court. (*Id.* at 18.) His defense attorneys, Dean Strang and Jerome Buting, argued, among other things, that the vindictive Manitowoc County Sheriff's Office, still fuming over Avery's prior exoneration, had planted evidence to ensure conviction of a man they had already deemed guilty. (*Id.* at 15, 18.) As part of this defense, Strang cross-examined Colborn, challenged his motives, and tried to paint his conduct as unscrupulous. (*Id.* at 19-20.) Colborn repeatedly denied any wrongdoing. (*Id.* at 19-21.) In closing argument, Kratz explicitly called the frame-up defense a red herring because,

regardless of whether police planted the Toyota key or Avery's blood, the abundance of other evidence sufficed to establish Avery's guilt beyond a reasonable doubt. (*Id.* at 22.) The jury apparently agreed. It returned a guilty verdict on the charges of intentional homicide and felon in possession of a firearm, and Avery was sentenced to life in prison without possibility of parole. (*Id.* at 24.)

Ricciardi and Demos spent the next several years editing footage and mapping out the first few episodes of their project. (*Id.* at 33.) By July 2013, the pair had independently shot 90% of the series and produced rough cuts of the first three episodes. (ECF No. 323 at 37.) One year later, impressed with the work, Netflix licensed *Making a Murderer*. (*Id.*) The company appointed Lisa Nishimura, Adam Del Deo, Ben Cotner, and Marjon Javadi to oversee the project. (ECF No. 318 at 1.) This core team provided feedback and suggestions to help shape the look and feel of the series, though Ricciardi and Demos retained responsibility for editing the cuts. (ECF No. 323 at 41.) And according to the Netflix team, none of them reviewed the raw footage of the trial or depositions. (*Id.* at 40-41.)

The finished product premiered on December 18, 2015 to critical and commercial acclaim. (ECF No. 326 at 35.) In this final cut, Colborn's three-hour trial testimony is reduced to 10 minutes spread across several episodes. (ECF No. 294 at 20.) Dramatic musical flourishes accent particular moments. (ECF No. 285 at 3.) And anachronistic responses are stitched together to give the appearance of a seamless examination. (ECF No. 105 at 44-56.) The episodes also platform Strang and Buting, who, in out-of-court interviews, reiterate their theory that Manitowoc law enforcement officials planted evidence. (ECF No. 287 at 6.) Netflix later released a second season of the program, also produced by Ricciardi and Demos, which focused on Avery's postconviction attorney's attempts to exonerate him. (ECF No. 326 at 43.)

LEGAL STANDARD

"Summary judgment is appropriate where the admissible evidence reveals no genuine issue of any material fact." *Sweatt v. Union Pac. R. Co.*, 796 F.3d 701, 707 (7th Cir. 2015) (citing Fed. R. Civ. P. 56(c)). Material facts are those under the applicable substantive law that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of "material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. If the parties assert different views of the facts, the Court must view

the record in the light most favorable to the nonmoving party. *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).

ANALYSIS

Colborn has two claims for relief.[2] (ECF No. 105.) His primary legal theory is defamation. But he also alleges intentional infliction of emotional distress. (*Id.* ¶¶77-81.) Based on the record, neither claim survives summary judgment.

I. Colborn's Defamation Claims Fail as a Matter of Law.

Colborn has only seen about an hour of *Making a Murderer*, ECF No. 271 at 23, but that was enough for him to dub it defamatory. Wisconsin law and the First Amendment require a deeper and more comprehensive analysis. To prove defamation under Wisconsin law, a plaintiff "must show that the defendant (1) published (2) a false, (3) defamatory, and (4) unprivileged statement." *Fin. Fiduciaries, LLC v. Gannett Co., Inc.*, 46 F.4th 654, 665 (7th Cir. 2022) (citing *Torgerson v. J./Sentinel, Inc.*, 563 N.W.2d 472, 477 (1997)). For public officials, like Colborn, the First Amendment also requires "clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i.e.*, with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). And the statement at issue must be "of and concerning" the plaintiff. *See Sullivan*, 376 U.S. at 288.

These legal standards wipe out the bulk of Colborn's case. His summary judgment motion adopts an overbroad view of defamation, identifying 52 allegedly defamatory statements. (*See* ECF No. 285 at 6-12.) But most of his gripes read more like media criticism better suited to the op-ed section; they are not actionable statements that could even potentially be defamatory under Wisconsin law. Those few statements that might conceivably be actionable fail for other reasons. Colborn's "defamation by fabricated quotation" claim fares no better because the record shows no instance in which Defendants did not convey the gist of a changed quotation. Colborn's final theory, a claim for "defamation by implication," also fails because he has not produced sufficient evidence to sustain it. Accordingly, the defamation claim cannot proceed to trial.

[2] A third claim for negligence was previously dismissed. (ECF No. 176.)

A. Most of Colborn's 52 Allegedly Defamatory Statements Are Not Actionable, and Those That Are Fail for Other Reasons.

Colborn affirmatively seeks summary judgment in his own favor based on a host of specific aspects of *Making a Murderer*. His kitchen-sink approach identifies 52 instances of alleged defamation. He cites the series' use of music and graphics, its inclusion of certain statements of and concerning other people, its incorporation of true statements or protected opinions, and the alteration of reaction shots from Avery's homicide trial. None of these can support a claim for defamation.

Music and graphics, for example, in isolation, are not "statements" of fact capable of filching from one his good name. *See Terry v. J. Broad. Corp.*, 840 N.W.2d 255, 267-68 (Wis. Ct. App. 2013) (holding that a plaintiff had no case when she challenged only music and video edits but not the words used to portray her). That ousts 13 of Colborn's proposed 52 defamatory statements.[3] While it is true that Netflix's representatives sought "to establish a subtle but impactful theme track for the baddies," (ECF No. 286-9 at 36), no principle of defamation law subjects a publisher to liability based solely on an unnerving musical motif. Moreover, Colborn is not even one of the "baddies" listed in the Netflix notes, so the notes and the corresponding music are also not actionable because they are not "of and concerning" him. (*See id.*)

Colborn makes similar, futile challenges to other statements that are not "of and concerning" him. For example, he objects to Steven Avery's voiceover: "They had the evidence back [in 1985] that I didn't do it. But nobody said anything." (ECF No. 285 at 6.) Though Colborn identifies the voiceover as defamatory, he never explains how it implicates him or why it is false. This is not an anomalous oversight. Colborn also takes issue with Stephen Glynn (Avery's attorney in his $36 million civil case) saying:

> We were just on the absolute edge of getting ready to go after the named defendants in the case with depositions when I get a call from Walt who tells me that he has gotten a call from a journalist asking if either of us would care to comment on the apparent intersection in life between Steven Avery and a woman who has gone missing in the Manitowoc area who we later learn to be Teresa Halbach.

(*Id.* at 9.) On its face, this has nothing to do with Colborn, and he offers no evidence or analysis to the contrary. It therefore cannot be defamatory towards him. The same applies to the words of

[3] See proposed defamatory facts numbers 5, 8, 10, 12, 15, 17, 21, 23, 24, 26, 43, 47, and 52. (ECF No. 287 at 2-4, 7-8.)

a male bar patron: "I only have one word, from the cops on up; it's corruption. Big time. I mean, if people dig far enough, they'll see that." (*Id.* at 10) (cleaned up). If this vague critique of bureaucracy constituted defamation, free speech would be reduced to the freedom to commend those in power. *See Sullivan*, 376 U.S. at 292 (rejecting Alabama's attempt to "transmut[e] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed."). Yet Colborn relies on 22 allegedly defamatory statements of this ilk.[4] (*See e.g.*, ECF No. 287 at 2, ("They weren't just gonna let Stevie out. They weren't gonna hand that man 36 million dollars."); 5, ("All I can think is they're trying to railroad me again."); 9 ("Them people ain't gonna get away with everything.").)

Other parts of Colborn's case reflect his own dissatisfaction with what is in fact the verifiable truth. It is well-established that "[t]ruth is an absolute defense to a defamation claim." *Anderson v. Hebert*, 798 N.W.2d 275, 280 (Wis. Ct. App. 2011). Thus, in defamation lawsuits at least, verity still prevails, even if the audience lacks the temperament for it. Colborn felt stung by *Making a Murderer*'s inclusion of Glynn's statement:

> [T]here is not only something to this idea that law enforcement had information about somebody else, but there is serious meat on those bones, I mean serious meat. What we learn is that while Steven Avery is sitting in prison, now for a decade, a telephone call comes in to the Manitowoc County Sheriff's Department from another law enforcement agency . . . saying that they had someone in custody who said that he had committed an assault in Manitowoc, and an assault for which somebody was currently in prison.

(ECF No. 287 at 2.) This statement may be unflattering, but the record confirms it is entirely accurate. The same can be said for the docuseries' use of Colborn's deposition testimony from Avery's civil case. (*Id.* at 3.) Altogether, Colborn complains seven times of statements that no one, not even he himself, can prove false.[5] In these instances, it is the facts that aggrieve Colborn, and there is no legal remedy for that. *See Lathan v. J. Co.*, 140 N.W.2d 417, 423 (Wis. 1966)

[4] See proposed defamatory facts numbers 3-4, 7, 11, 20, 22, 25, 27-31, 33-38, 41-42, 49, and 54. (ECF No. 287 at 2-8.)
[5] See proposed defamatory facts numbers 9, 13-14, 18-19, 46, and 53. (ECF No. 287 at 2-4, 7-8.)

("Truth is a complete defense to a libel action.") (citing *Williams v. J. Co.*, 247 N.W. 435 (Wis. 1933)).

Nor can Colborn make a defamation case out of his adversaries' opinions. "Although opinions are not completely exempt from the realm of defamatory communications," *see Terry*, 840 N.W.2d at 266, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (citations omitted). For example, contrary to Colborn's claims, no reasonable viewer could interpret Glynn's explanation of why he thinks Colborn authored a report the day after Avery left prison, *i.e.*, "I think I know [why Colborn authored the report at that time,]" (ECF No. 287 at 3), as anything other than "a subjective view, an interpretation, a theory." Defamation cannot lie for such plainly speculative statements. Colborn relies on another ten, similarly subjective opinions, as part of his defamation case,[6] but these speculations are not actionable as a matter of law.

Equally meritless are Colborn's attempts to turn spliced reaction shots into slander. It is undisputed that the Producers experienced technological snafus that rendered the unedited raw footage of the witness box at Avery's trial unusable. (ECF No. 288 at 10.) As a result, Ricciardi and Demos paid local news outlets for access to their "mixed feed" footage, which cut between counsel, the judge, witnesses, the gallery, and the projection screen. (*Id.* at 10-11.) Because the "mixed feed" did not adopt a steady point of view, it did not always maintain its gaze on witnesses when they stopped speaking. To accommodate for this limitation, the producers occasionally used witness reaction shots from other parts of the trial to fill in the gaps. (*Id.* at 11-12.) Colborn contends that rather than choose the most comparable reaction shots, Ricciardi and Demos used the corrupted footage as an excuse to insert incongruous scenes that made him appear nervous and uncertain. (*See* ECF No. 327 at 57–60.) The problem with this theory is that reaction shots are not falsifiable "statements" capable of defaming their subjects. *See Terry*, 840 N.W.2d at 267 (rejecting a plaintiff's ability to challenge to the way she was portrayed in video edits). In fact, Colborn's papers implicitly acknowledge the vagaries of body language analysis—he has, at different times, described the same shot (leaning back and cracking his knuckles) as making him look apprehensive *and* more confident. (ECF No. 356 at 13.) If the scenes the producers included

[6] See proposed defamatory facts numbers 6, 16, 32, 39-40, 44-45, 48, and 50-51. (ECF No. 287 at 2-3, 6-8.)

are open to such ambiguity, then they are not false in any meaningful sense. And the abstruse, knuckle-cracking interstitial is Colborn's strongest case. His other examples ascribe extensive psychoanalytic intentions to momentary breaks in eye contact. (ECF No. 346-1 at 112-119.) None of this is defamatory.[7]

Colborn is, therefore, not entitled to summary judgment on any of the 52 allegedly defamatory statements he identifies. Conversely, because no reasonable jury could find any of the 52 statements defamatory, Defendants are entitled to summary judgment on any claim based on them.

B. Even Where *Making a Murderer* Alters Colborn's Testimony, it Captures the Gist.

In addition to challenging the 52 previously identified statements, Colborn's complaint includes a "defamation by fabricated quotation" theory. (*See* ECF No. 105 at 44-56.) The idea here is that, in the course of condensing the trial footage, Defendants deliberately altered Colborn's words to make him appear more contemptible. Of course, some alteration is necessary. No documentary is "true" in the strictest sense of the word; they all abbreviate, edit, and emphasize. But there are degrees of falsity, and, for defamation purposes, the question is where to draw the line. After all, "[i]f every [altered quotation] constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change . . . inconsistent with . . . First Amendment principles." *Masson*, 501 U.S. at 514. Thus, to protect journalists, as well as other voices shouting into the marketplace of ideas, minor inaccuracies are forgiven "so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Id.* at 517 (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. Dist. Ct. App. 1936)). "Put another way, [a] statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (quoting Robert D. Sack, *Libel, Slander, and Related Problems* 138 (1st ed. 1980)).

Colborn's position is that *Making a Murderer*'s use of "frankenbites" (an industry term for the practice of taking a word from one place and inserting it somewhere else) effected "a material change in the meaning conveyed by [his testimony]." *Masson*, 501 U.S. at 517. It is easy to understand how disparate statements, cobbled together and presented as unbroken speech, might

[7] Though none of the 52 allegedly defamatory facts Colborn incorporates in his motion for summary judgment are individually actionable, they will be considered, in the aggregate, as part of his overall claim for defamation by implication in Part I.C.

produce bastardized remarks that alter or even undermine the meaning of those original statements. But the theoretical possibility of defamatory editing is not enough to carry Colborn's burden. Instead, he must cite specific instances where *Making a Murderer* edited his testimony and changed its meaning in a defamatory fashion. Swapping in "No, sir" for "No, I don't" obviously does not suffice. (ECF No. 105 at 48.) Excising similarly trivial revisions, the "frankenbites" Colborn identifies fall into four baskets: (1) those concerning the 1994 or 1995 phone call; (2) those concerning the 2005 call to dispatch; (3) those concerning the discovery of the Toyota key; and (4) those taken from Colborn's deposition in Avery's civil case. The Court will evaluate them in turn.

1. Edits to Colborn's Testimony About the 1994 or 1995 Phone Call.

At trial, Colborn testified:

> In 1994 or '95 I had received a telephone call when I was working as my capacity as a corrections officer in the Manitowoc County Jail. Telephone call was from somebody who identified himself as a detective. And I answered the phone, Manitowoc County Jail, Officer Colborn. Apparently, this person's assumption was that I was a police officer, not a corrections officer, and began telling me that he had received information that somebody who had committed an assault, in Manitowoc County, was in their custody, and we may have somebody in our jail, on that assault charge, that may not have done it. I told this individual, you are probably going to want to speak to a detective, and I transferred the call to a detective, to the Detective Division, at the Manitowoc County Sheriff's Department. That's the extent of my testimony.

(ECF No. 105 at 47-48.) *Making a Murderer* condenses this testimony:

> In 1994 or '95 I had received a telephone call when I was working as my capacity as a corrections officer in the Manitowoc County Jail. Telephone call was from somebody who identified himself as a detective, and began telling me that he had somebody who had committed an assault, in Manitowoc County, was in their custody, and we may have somebody in our jail, on that assault charge, that may not have done it. I told this individual, you are probably going to want to speak to a detective, and I transferred the call to a detective.

(*Id.*) Nothing in the abridged version of Colborn's statement "differ[s] materially in meaning from [the original] so as to create an issue of fact for a jury as to falsity." *Masson*, 501 U.S. at 521. *Making a Murderer*'s edits eliminate redundancies, *i.e.*, Colborn repeating his position and reiterating that he transferred the call to detectives, without sacrificing truth. Synthesizing a

lengthy explanation is not defamatory. *Id.* at 524. The revised passage is, thus, substantially the same as the original and not false for purposes of defamation.

During cross-examination, Strang followed up with Colborn about the phone call:

> STRANG: [W]hile we're on Steven Avery and your reports about him, that phone call, the phone call you took way back in 1994 or 1995, when you were working in the jail, the phone call where a detective from another law enforcement agency told you you may have the wrong guy in jail, that one?
>
> COLBORN: Yes, sir.
>
> STRANG: Did you ever write a report about that?
>
> COLBORN: No, sir.
>
> STRANG: Well, actually you did, didn't you? It was about eight years later, wasn't it?
>
> COLBORN: I wrote a statement on it, yes, sir.
>
> STRANG: You wrote a statement after Sheriff Peterson suggested that maybe you should?
>
> COLBORN: Yes, sir.
>
> STRANG: You wrote that statement in 2003, about the 1994 or 1995 telephone call?
>
> COLBORN: Yes.
>
> STRANG: You wrote that statement in 2003, the day after Steven Avery finally walked out of prison, didn't you?
>
> COLBORN: I don't know what day Steve was released from prison, but I wrote the statement in 2003.

(ECF No. 105 at 51-52.) In *Making a Murderer*, the exchange goes like this:

> STRANG: [W]hile we're on Steven Avery and your reports about him, that phone call, the phone call where a detective from another law enforcement agency told you [you] may have the wrong guy in jail, that one?
>
> COLBORN: Yes, sir.
>
> STRANG: Did you ever write a report about that?
>
> COLBORN: No, I did not, sir.
>
> STRANG: Well, actually you did, didn't you? It was about 8 years later, wasn't it?
>
> COLBORN: I wrote a statement on it, yes, sir.
>
> STRANG: You wrote a statement in 2003, about the 1994 or 1995 telephone call?
>
> COLBORN: Yes.

> STRANG: [T]he day after Steven Avery finally walked out of prison, didn't you?
>
> COLBORN: I don't know what day Steve was released from prison, but I wrote the statement in 2003.

(*Id.*) Both versions convey the same substance—that Colborn wrote a report about a phone call eight years after he received it, around the time of Avery's exoneration. The only notable difference is that *Making a Murderer* omits Sheriff Petersen's suggestion that Colborn draft the report. This hardly makes the testimony false, especially considering that, by this point in the docuseries, Stephen Glynn has already told viewers that the sheriff ordered a report from Colborn and Lenk. (*See* ECF No. 320 at 10.)

On redirect, special prosecutor Kratz and Colborn had the following exchange regarding the phone call:

> KRATZ: As you look back, back in 1994 or '95, if you would have written a report, what would it have been about?
>
> COLBORN: That is why I didn't do one. I don't know what it would have been about, that I received a call and transferred it to the Detective Division. If I wrote a report about every call that came in, I would spend my whole day writing reports.
>
> KRATZ: Did this person ever identify the individual that they were talking about?
>
> COLBORN: No, sir. There were no names given.
>
> KRATZ: Let me ask you this, as you sit here today, Sergeant Colborn, do you even know whether that call was about Mr. Steven Avery?
>
> COLBORN: No, I don't.

(ECF No. 105 at 52.) In *Making a Murderer*, this exchange is shortened and presented as part of Kratz's direct examination:

> KRATZ: Back in 1994 or '95, if you would have written a report, what would it have been about?
>
> COLBORN: I don't know what it would have been about. If I wrote a report about every call that came in, I would spend my whole day writing reports.
>
> KRATZ: Let me ask you this, Sergeant Colborn, do you even know whether that call was about Mr. Steven Avery?
>
> COLBORN: No, sir.

(*Id.*) This, too, adequately captures the gist of Colborn's testimony—the identity of the potentially wrongfully incarcerated individual who was the subject of the 1994 or 1995 phone call was not

established during that call, so Colborn had nothing to write a report about. Both the original and edited passages reflect that Colborn lacked the necessary information to make a report worthwhile; the latter is not materially false.

2. Edits to Colborn's Testimony About the 2005 Call to Dispatch.

During Avery's trial, Strang played Colborn an extended recording of his November 3, 2005 call to dispatch. (ECF No. 105 at 53-54.) During the call, Colborn gave the dispatcher Halbach's license plate number and asked to confirm that the car was a 1999 Toyota. (*Id.*) Recapping the call, Strang initiated the following exchange:

> STRANG: And the dispatcher tells you that the plate comes back to a missing person or woman?
>
> COLBORN: Yes, sir.
>
> STRANG: Teresa Halbach. Mispronounces the last name, but you recognize the name?
>
> COLBORN: Yes, sir.
>
> STRANG: And then you tell the dispatcher, "Oh, '99 Toyota"?
>
> COLBORN: No, I thought she told me that.

(ECF No. 290-19 at 184.) Strang then replayed the audio and said:

> STRANG: Actually you who suggests this is a '99 Toyota?
>
> COLBORN: I asked if it was a '99 Toyota, yes.
>
> STRANG: And the dispatcher confirmed that?
>
> COLBORN: Yes.

(*Id.* at 185.) *Making a Murderer* excludes Colborn's admission of his mistake. (ECF No. 105 at 12.) Colborn believes that omission defamatory and cites to an uncommon, online source to prove it. According to Redditor u/docuseriesfan, the way the docuseries presented the testimony left viewers with the misimpression that Colborn "didn't have much of a response after [Strang] played the recording twice." (ECF No. 132-7.) There are two problems with relying on this kind of evidence. First, defamation is (mercifully) not proven in the bowels of social media websites, especially niche subreddits. No publisher is required "to guarantee the truth of all the inferences a [viewer] might reasonably draw from a publication." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 487 (7th Cir. 1986). Second, and more importantly, *Making a Murderer* got the sting of this portion of testimony right. An inaccuracy is not a falsehood under defamation law unless "it 'would have a different effect on the mind of the reader from that which the pleaded truth would

have produced.'" *Masson*, 501 U.S. at 517 (quoting Sack, *supra*). The reality is that Colborn *did not* actually have much of a response after Strang replayed the dispatch audio. He simply agreed that he had, indeed, first raised the make and year of the vehicle. That much is evident from the first and second listen. Omitting one sentence restating the obvious and instead segueing directly into the next line of questioning did not injure Colborn's reputation any more or less than a verbatim reproduction would have. *See Haynes*, 8 F.3d at 1229 (no defamation where variants of the truth did not paint the plaintiff in a worse light).

Immediately after the preceding exchange, Strang pressed Colborn to answer how he could have called in a license plate if he was not already looking at it. (ECF No. 105 at 55.) The implication being that Colborn discovered Halbach's Toyota two days before it was officially found on Avery's property and therefore had the opportunity to plant the Toyota there as part of a frame-up.

> STRANG: Were you looking at these plates when you called them in?
>
> COLBORN: No, sir.
>
> STRANG: And your best guess is that you called them in on November 3, 2005?
>
> COLBORN: Yes, probably after I received a phone call from Investigator Wiegert letting me know that there was a missing person.
>
> STRANG: Investigator Wiegert, did he give you the license plate number for Teresa Halbach when he called you?
>
> COLBORN: I don't remember the entire content of our conversation, but, obviously, he must have because I was asking the dispatcher to run the plate for me.
>
> STRANG: Did you not trust that Investigator Wiegert got the number right?
>
> COLBORN: I don't – That's just the way I would have done it. I don't – It's not a trust or distrust issue.

(ECF No. 290-19 at 185-86.) At this point, the parties took their afternoon recess. When they returned, Strang mistakenly asked Colborn if Wiegert had given him Halbach's *phone number*. He then corrected himself:

> STRANG: I'm sorry. I apologize. What I meant is, you don't recall, as you sit here today, whether Mr. Wiegert gave you Teresa

> Halbach's license plate number when he called you on November 3?
>
> COLBORN: You know,[8] I just don't remember the exact content of our conversation then.
>
> STRANG: But –
>
> COLBORN: He had to have given it to me because I wouldn't have had the number any other way.
>
> STRANG: Well, and you can understand how someone listening to that might think that you were calling in a license plate that you were looking at on the back end of a 1999 Toyota; from listening to that tape, you can understand why someone might think that, can't you?
>
> KRATZ: It's a conclusion, Judge. He's conveying the problems to the jury.
>
> THE COURT: I agree, the objection is sustained.
>
> STRANG: This call sounded like hundreds of other license plate or registration checks you have done through dispatch before?
>
> COLBORN: Yes.
>
> STRANG: But there's no way you should have been looking at Teresa Halbach's license plate on November 3, on the back end of a 1999 Toyota?
>
> KRATZ: Asked and answered, your Honor, he already said he didn't and was not looking at the license plate.
>
> THE COURT: Sustained.
>
> STRANG: There's no way you should have been, is there?
>
> COLBORN: I shouldn't have been, and I was not looking at the license plate.
>
> STRANG: Because you are aware now that the first time that Toyota was reported found was two days later on November 5?
>
> COLBORN: Yes, sir.

(*Id.* at 187-88.) *Making a Murderer* omits a significant chunk of this and inserts a portion of testimony (*italicized* below) given a few minutes earlier:

> STRANG: Were you looking at these plates when you called them in?

[8] In the trial transcript, Colborn is quoted as saying: "No, I just don't remember the exact content of our conversation then." (ECF No. 290-19 at 187.) The video exhibits, however, conclusively show that he actually said: "*You know*, I just don't remember the exact content of our conversation then." (ECF No. 283-13 at 13-16); *see Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (requiring courts considering summary judgment motions to view the facts in the light depicted by the objective evidence).

> COLBORN: No, sir.
>
> *STRANG: Do you have any recollection of making that phone call?*
>
> *COLBORN: I'm guessing 11/03/05, probably after I received a phone call from Investigator Wiegert letting me know that there was a missing person.*
>
> STRANG: Investigator Wiegert, did he give you the license plate number for Teresa Halbach when he called you?
>
> COLBORN: You know, I just don't remember the exact content of our conversation then.
>
> STRANG: But –
>
> COLBORN: He had to have given it to me, because I wouldn't have had the number any other way.
>
> STRANG: Well, and you can understand how someone listening to that might think that you were calling in a license plate that you were looking at on the back of a 1999 Toyota?
>
> COLBORN: Yes.
>
> STRANG: But there's no way you should have been looking at Teresa Halbach's license plate on November 3, on the back end of a 1999 Toyota?
>
> COLBORN: I shouldn't have been, and I was not looking at the license plate.
>
> STRANG: Because you are aware now that the first time that Toyota was reported found was two days later on November 5?
>
> COLBORN: Yes, sir.

(ECF No. 105 at 55-56; ECF No. 290-19 at 185-86.)

Colborn is correct that this amalgamation of truncations and "frankenbites" does not cleanly track the trial transcript. But, again, that is not enough. An author may even attribute words he never uttered to a speaker without running afoul of defamation law, so long as the result conveys the substantial truth. *See Masson*, 501 U.S. at 514-15. Colborn argues that resecting his response—"obviously" Wiegert must have given him Halbach's license plate number—subjected him to "significantly greater opprobrium" because it lent credence to Strang's theory of the case. *Haynes*, 8 F.3d at 1228 (quoting *Herron v. King Broad. Co.*, 776 P.2d 98, 102 (Wash. 1989)). *Making a Murderer* does, however, feature Colborn explaining that Wiegert "had to have given [the license plate number] to me, because I wouldn't have had the number any other way." (ECF No. 105 at 55.) In both passages, Colborn reaches his conclusion through deduction, not

recollection. He admits he cannot remember the conversation with Wiegert but reasons that it must have been the source of Halbach's license plate through process of elimination. Including "obviously" may have intimated a slightly stronger sense of conviction, but its exclusion does not mean that the docuseries departed from the substantial truth or failed to capture the gist of Colborn's testimony. *See Masson*, 501 U.S. at 524 (finding no material falsity when an author wrote that the subject of his piece changed his name because "it sounded better" instead of using the subject's actual explanation that he "just liked" it).

Colborn also challenges the producers' decision to show him agreeing that he could understand how someone might think he was looking at Halbach's Toyota based only on the audio of his dispatch call. In fact, Colborn never answered that question because his attorney objected, and the judge sustained the objection. (ECF No. 290-19 at 188.) But, though not depicted in *Making a Murderer*, Colborn later affirmed on the witness stand that the call sounded like hundreds of other license plate or registration checks he had done before. (ECF No. 105 at 55-56.) In essence, he testified that the audio closely resembled a mine-run dispatch call. And a mine-run dispatch call involves an officer "giv[ing] the dispatcher the license plate number of a car they have stopped, or a car that looks out of place for some reason." (ECF No. 290-19 at 179.) Thus, Colborn implicitly admitted that, based only on the audio of his dispatch call, it sounded like he had Halbach's license plate in his field of vision. This is not materially different from saying that he could understand why someone would think he was looking at Halbach's license plate when he made the call. On top of this, *Making a Murderer* includes Colborn forcefully denying that he ever saw Halbach's vehicle on November 3, 2005. In context, this captures the sting of his testimony—Wiegert must have given him the license plate number, and although it sounded like he was reading the license plate number off a car, he was not in fact doing so.

3. Edits to Colborn's Testimony About Discovering the Toyota Key.

On direct examination, Kratz and Colborn had the following exchange:

> KRATZ: Have you ever planted any evidence against Mr. Avery?
>
> COLBORN: That's ridiculous, no I have not.
>
> KRATZ: Have you ever planted any evidence against anybody in the course of your law enforcement career?
>
> COLBORN: I have to say that this is the first time my integrity has ever been questioned, and no, I have not.

(ECF No. 105 at 48.) *Making a Murderer* fuses this into a single question and response:

> KRATZ: Have you ever planted any evidence against Mr. Avery?
>
> COLBORN: I have to say that this is the first time my integrity has ever been questioned, and no, I have not.

(*Id.*) This neither materially altered Colborn's testimony, nor exposed him to significantly greater opprobrium. *Making a Murderer* communicates in two lines what the trial transcript conveys in four. That is narrative efficiency, not defamation.

4. Edits to Colborn's Deposition in Avery's Civil Case.

During his deposition, Glynn asked Colborn whether he had spoken to anyone about the 2003 statement he authored regarding the 1994 or 1995 phone call:

> GLYNN: And do you recall any further conversations with Sheriff Petersen about this subject matter?
>
> COLBORN: No.
>
> GLYNN: How about any meetings with District Attorney Rohrer about this subject matter, and again, I mean the subject matter of Exhibit 138 that we've been discussing. [9]
>
> COLBORN: No, I've never had a meeting with the district attorney about this.
>
> GLYNN: Okay. How about an assistant district attorney named Mike Griesbach?
>
> COLBORN: Never had a meeting with Mike Griesbach about this.
>
> GLYNN: [H]ave you ever had any conversations with anybody else, other than Sheriff Peterson and Lieutenant Lenk, about the subject matter of Exhibit 138? Ever discuss it with anyone else, any other officers, any friends, any family?
>
> COLBORN: Not that I can specifically recall. I may have mentioned it to other people, but I don't recall doing it.
>
> GLYNN: That is, as you're sitting here today, you don't have any specific recollection of discussing it with anybody else.
>
> COLBORN: No, sir.
>
> GLYNN: But you're not ruling out the possibility that you may have discussed it.
>
> COLBORN: No, I'm not ruling out that possibility that I may have discussed it with someone else, but I can't specifically tell you names of people I may have mentioned this to.

(ECF No. 120-14 at 7.) *Making a Murderer* depicts only a smidgen of this:

[9] Exhibit 138 was Colborn's 2003 statement about the 1994 or 1995 phone call he received. (ECF No. 120-14 at 3.)

> GLYNN: Have you ever had any conversations with anybody else other than Sheriff Petersen and Lieutenant Lenk about the subject matter of [E]xhibit 138? Ever discuss it with anyone else, any other officers, any friends, any family?
>
> COLBORN: Not that I can specifically recall. I may have mentioned it to other people, but I don't recall doing it.

(ECF No. 105 at 32.) The docuseries then transitions to edited excerpts from the depositions of Manitowoc County District Attorney Mark Rohrer and Manitowoc County Chief Deputy Eugene Kusche. Walt Kelly (another of Avery's lawyers in his civil case) and Rohrer are shown having the following conversation:

> KELLY: At the time that you received information from the crime lab telling you that Gregory Allen was inculpated in the sexual assault of Mrs. Beernsten, did you have conversation with any people in the Sheriff's office?
>
> ROHRER: Yes.
>
> KELLY: Who were they?
>
> ROHRER: Andy Colborn, and Jim Lenk had information that he had received.

(*Id.*) Kusche's deposition proceeds:

> KELLY: This document reflects a conversation between you and [Manitowoc County Assistant District Attorney] Douglass Jones shortly after it became public knowledge that Steven Avery had been exculpated and that Gregory Allen had been inculpated, right?
>
> KUSCHE: That's correct.
>
> KELLY: All right. He says as he, Doug Jones, was trying to close the conversation, you told him that in 95 or 96 Andy Colborn had told Manitowoc County Sheriff Tom Kocourek that an officer from Brown County had told Colborn that Allen and not Avery might've actually committed the [Beerntsen] assault. Okay? Did you in fact tell that to Douglass Jones?
>
> KUSCHE: I don't recall.
>
> KELLY: All right. Does seeing this document, 124,[10] refresh your recollection?
>
> KUSCHE: My recollection of this conversation, which is not very strong, was that Colborn made a comment to me about re-- getting some information…

[10] Exhibit 124 is Douglass Jones' September 18, 2003 memo regarding a conversation he had with Kusche about the Avery exoneration. (ECF No. 120-18 at 2.)

> KELLY: Yeah …. Okay the statement goes on and says, the next sentence says, "Gene stated," that's you, "that Colborn was told by Kocourek something to the effect that we already have the right guy, and he should not concern himself." Now, did Colborn tell that to you?
>
> KUSCHE: I don't recall….
>
> KELLY: Do you have any reason to believe that Doug Jones would misrecord what you told him?
>
> KUSCHE: No.
>
> KELLY: Then it goes on to say that Doug Jones asked you if this information was known. Do you remember asking that?
>
> KUSCHE: No.
>
> KELLY: Then it goes on to say that you said James Lenk … was aware. Did you tell that to Doug Jones?
>
> KUSCHE: If he put it there, I probably did.
>
> KELLY: And what was the basis for your knowledge about that?
>
> KUSCHE: It would have had to have been from Andy Colborn.

(*Id.* at 33-34) (cleaned up).

Colborn contends this deposition mashup unfairly depicts him as a liar because it undermines his assertion that he may have discussed his statement with others but did not remember doing so, without incorporating his qualification that he was not ruling out the possibility that he spoke to others. This effort, like so many of Colborn's attempts to construct a defamation claim, fails because the docuseries provides a reasonably accurate summation of the gist of the underlying statement. Indeed, contrary to Colborn's suggestion, *Making a Murderer* does incorporate the supposedly missing qualification. Colborn is shown explicitly stating that he cannot "specifically recall" speaking about his statement with others, but that he "may have mentioned it to other people." That qualification is materially the same as "not ruling out the possibility" of speaking with others. Moreover, by excluding certain portions of his deposition testimony, *Making a Murderer* may have actually *enhanced* Colborn's credibility. At his deposition, Colborn unequivocally denied ever broaching the 1994 or 1995 phone call with District Attorney Rohrer. (ECF No. 120-14 at 7.) Rohrer's testimony called that into question. (ECF No. 120-12 at 11.) Were *Making a Murderer* the calibrated hit piece Colborn claims, its producers surely would have leapt at the chance to catch the object of their disdain in an outright lie.

Colborn also decries the juxtaposition of his deposition testimony with Glynn's soliloquy questioning the absence of a paper trail regarding the 1994 or 1995 phone call:

> [Deposition footage]
>
> GLYNN: [Referring to the 1994 or 1995 phone call] I mean that's a significant event.
>
> COLBORN: Right, that's what stood out in my mind.
>
> [Glynn's interview]
>
> GLYNN: The fellow who got that call was a guy named [Colborn]. And you might say that there should be a record of him immediately making a report on this, there might be a record of his immediately contacting a supervising officer, there might be a record of him contacting a detective who handles sexual assault cases, ahh, there might be some record of it. But if you thought any of those things, you'd be wrong because there isn't any record in 1995, 1996, 1997, 1998, 2000, 2001, 2002, 2003. Now 2003 is a year that has meaning because that's when Steven Avery got out. And the day he got out, or the day after, that's when [Colborn] decides to contact his superior officer, named Lenk. And Lenk tells him to write a report.

(ECF No. 105 at 30.) Once more, nothing here is false. Colborn testified that the phone call was a significant event, and there was no *record* of what he did with the information he received until 2003. The absence of that record does not mean *Making a Murderer* communicates that Colborn took no action. On the contrary, the documentary shows him explaining that he transferred the call to a detective. That it does not undertake additional explanation to make Colborn look better does not render the material presented false or defamatory.

Ultimately, every alteration Colborn identifies retains the gist of its source material. "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Modifications that maintain meaning do not implicate this interest and are, therefore, not compensable in defamation. Because, on the evidence in the record, no reasonable jury could find that *Making a Murderer*'s edits to Colborn's testimony materially changed the substance of that testimony, Defendants are entitled to summary judgment as to every allegedly fabricated quotation.

C. Colborn Does Not Have Sufficient Evidence to Pursue a Defamation by Implication Claim.

While the individual statements and "frankenbites" that Colborn cites all fail to support a defamation claim, he makes a better, although still unsuccessful, effort to establish defamation by tying them together. Under Wisconsin law, "[t]he 'statement' that is the subject of a defamation action need not be a direct affirmation, but may also be an implication." *Fin. Fiduciaries, LLC*, 46 F.4th at 665 (quoting *Mach v. Allison*, 656 N.W.2d 766, 772 (Wis. Ct. App. 2002)). "In a case of defamation by implication, the court must decide 'whether an alleged defamatory implication is fairly and reasonably conveyed by the words and pictures of the publication.'" *Id.* (quoting *Mach*, 656 N.W.2d at 778). As with other theories, the plaintiff must also proffer at least enough evidence to raise a jury question as to material falsity and actual malice. *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1317 (7th Cir. 1988). Additionally, "where the plaintiff is claiming defamation by [implication], he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material." *Id.* at 1318. "Evidence of defamatory meaning and recklessness regarding potential falsity does not alone establish the defendant's intent." *Id.* (citing *Woods*, 791 F.2d at 487).

Colborn argues that *Making a Murderer* falsely implies that he committed criminal acts (planting evidence) and is thus defamatory per se. *See Teague v. Schimel*, 896 N.W.2d 286, 300 (Wis. 2017) (holding that falsely imputing commission of a criminal act is defamation per se). Defendants assert that Colborn's case falls short for at least three reasons: (1) the implication that Colborn planted evidence is not reasonably conveyed and attributable to Defendants; (2) Colborn cannot prove that he did not plant evidence; and (3) Colborn cannot satisfy defamation by implication's heightened actual malice standard. The first two arguments fail; a reasonable jury might find that *Making a Murderer* falsely implied that Colborn planted evidence. But because Defendants are correct that Colborn cannot show actual malice, this theory also fails.

1. A Jury Could Find that *Making a Murderer* Reasonably Conveys the Defamatory Implication that Colborn Planted Evidence and Also Find that Implication False.

"The court decides, as a matter of law, whether an alleged defamatory implication is fairly and reasonably conveyed by the words and pictures of [a] publication or broadcast." *Mach*, 656 N.W.2d at 712 (citing *Puhr v. Press Publ'g Co.*, 25 N.W.2d 62 (1946)). If there are competing

implications—one defamatory and one not—the duty to decide which the broadcast implies shifts to the jury. *Id.*

Defendants analogize this case to *Financial Fiduciaries*, which generally protects news media's right to truthfully report *allegations*, even if the truth of those allegations is suspect. 46 F.4th at 665-66; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (recognizing the First Amendment right to report the proceedings of government). But *Financial Fiduciaries* concerned a quintessential case of local news reporting that fell "comfortably within the . . . [reporting] privilege" identified in Wisconsin caselaw. 46 F.4th at 666. *Making a Murderer*, on the other hand, transcends objective journalism and tries to dramatize courtroom business in a manner that the fair report privilege does not obviously contemplate. It is more than a bare recitation of "just the facts." To do as Defendants wish and lump this kind of prestige television in with meat and potatoes beat reporting would expand the scope of the fair report privilege to a degree that is inconsistent with the common law or existing First Amendment authorities.

And without the privilege, the question of whether *Making a Murderer* implicitly adopted and reasonably conveyed the planting accusations raised by Avery and the members of his criminal defense team is for the jury to decide. A "reasonable documentary viewer" does not necessarily conflate the opinions of a documentary's subjects with those of the documentarians. For example, the documentary *Behind the Curve* profiles flat-earther Mark Sargent, but it does not, itself, imply that the Earth is flat. *Making a Murderer* takes a much different tack. Had it scored Avery's allegations to the sound of cuckoo clocks, no one could rationally accuse it of pedaling conspiracy.[11] A faithful recreation of the entire trial, framing defense and all, would also have defeated any claim for defamation. Yet *Making a Murderer* is not always so evenhanded in its presentation. To the extent it qualifies as journalism, it often hews closer to gonzo than objective, and its visual language could be read to suggest something perhaps more nefarious than the totality of the evidence warrants. Thus, a fair-minded jury could conclude that *Making a Murderer* not-so-subtlety nudges viewers toward the conclusion that Colborn did, in fact, plant evidence to frame Steven Avery.

The same jury could also find that implicit conclusion false. *See Torgerson*, 563 N.W.2d at 477 ("If the challenged statements as a whole are . . . substantially true, a libel action will fail.")

[11] Defendants certainly knew how to incorporate music to influence the viewers' perceptions. As discussed above, they used specific motifs to suggest Manitowoc County officials may have been up to no good.

(citing *Meier v. Meurer*, 98 N.W.2d 411 (1959)). To qualify as false, a "statement must: (1) assert or imply a fact that is capable of being proven false; or (2) . . . assert an opinion that directly implies the assertion of an undisclosed defamatory fact." *Wesbrook v. Ulrich*, 90 F. Supp. 3d 803, 810 (W.D. Wis. 2015) (citing *Mach*, 656 N.W.2d at 772). "[S]tatements of opinion are not actionable if they merely express 'a subjective view, an interpretation, a theory, conjecture, or surmise,' unless the defendant claims or purports to possess specific and objectively verifiable facts supporting that opinion." *Id.* at 810-11 (quoting *Haynes*, 8 F.3d at 1227).

As Special Prosecutor Kratz acknowledged in his closing argument, Avery's guilty verdict does not exonerate those accused of executing a frame-up. (ECF No. 326 at 22.) On what grounds, then, Defendants ask, can Colborn ascribe falsity to the implication that he framed Steven Avery? There is, admittedly, no formal paperwork absolving Colborn of guilt. But in asking for such proof, Defendants seek too much. If the media has license to accuse anyone of committing a crime unless he can categorically disprove that he has done so, then the protected interest in one's good name depends wholly on the altruism of journalists. What could a plaintiff in Colborn's position do to satisfy Defendants' proposed standard? Even acquittal is not akin to absolution, and there is no branch of logic that sanctions proof of a negative. Under Defendants' view, substantial truth is not only a defense, it is the default unless a defamation plaintiff can show beyond doubt what *did not* happen. That is not the standard. "A statement is … defamatory if, in its natural and ordinary sense, it imputes to the person charged commission of a criminal act." *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712, 715 (Wis. 1977). If there is no basis for the allegation of criminal conduct, then, for purposes of defamation, the allegation may be considered false. And under Wisconsin law, falsity should go to the jury unless obviously not in dispute. *See Martin v. Outboard Marine Corp.*, 113 N.W.2d 135, 140 (Wis. 1962). A reasonable jury could hold Defendants' statement false, so they are not entitled to summary judgment on the question of falsity.

2. Colborn Cannot Show Actual Malice.

To survive summary judgment, a public figure who brings a defamation claim must present enough evidence to allow a jury to find actual malice with convincing clarity. *Woods*, 791 F.2d at 484. Normally, actual malice exists where a defendant "publishe[s] [a] defamatory statement with knowledge of its falsity or with reckless disregard for whether it [is] false." *Id.* (citing *Sullivan*, 376 U.S. at 280). In the context of defamation by implication, though, actual malice requires

evidence that would permit a jury to conclude "that the defendants either *intended* or were reckless with regard to the potential falsity of the *defamatory inferences* which might be drawn from the [publication]." *Saenz*, 841 F.2d at 1318 (emphasis added). And this is determined subjectively, "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Thus, defamation defendants are entitled to judgment as a matter of law unless "pretrial affidavits, depositions or other documentary evidence" evince an intention to imply the defamatory implication the plaintiff identifies. *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976) (quoting *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-23 (D.C. Cir. 1970) (Wright, J., concurring)).

Colborn cites a trove of email chains that purportedly establish the actual malice of both the producers and Netflix. Most of these exchanges, however, support Defendants' position that they did not intend to imply and were not aware that viewers might infer that Colborn actually planted evidence to frame Avery.

The following sample of supposedly damning emails illustrates the dearth of evidence suggesting actual malice on the part of Ricciardi, Demos, and Chrome:

- In an email to Ricciardi, Mary Manhardt (a consulting editor who joined the producers' team in 2015) stated that the "[Avery salvage] yard and the rotting cars" were "metaphorical and evocative of our underdog heroes," while "the Manitowoc Courthouse Dome is a symbol . . . for the overdogs." (ECF No. 330-2 at 1.)
- In an email to Manhardt, Ricciardi wrote that Special Prosecutor Kratz would have "his day only for his 'story' to be retold by our more reliable narrators in the episode." (*Id.* at 39.)
- In an email to Ricciardi and Demos, Manhardt explained that in Episode 3, the producers could use Avery's defense team and family to make "the audience has to regain faith in [Avery] and start questioning the evidence." She also proposed trying "to make the audience feel very guilty and be kicking themselves for having learned nothing from the first case and having believe the [prosecutor's] press conference." (*Id.* at 9.)
- Peter Stone, who was responsible for compiling the trailer, emailed Demos and told her that he had replaced a shot with Colborn taking the oath at his deposition with a "squirmy shot." (ECF No. 330-7 at 1.)
- In an email to Nishimura and Del Deo, Ricciradi and Demos said they had met with Avery's former lawyer and "discussed the idea of re-testing the bloodstains found in Teresa's car." (ECF No. 330-1 at 73.)

Nothing in any of these emails indicates an intent to imply that Colborn framed Avery. That Manhardt saw underdogs and overdogs is irrelevant. Being an overdog means one is expected

to prevail, not that one is guilty of any particular crime. Similarly, intending to portray Kratz as an unreliable narrator is not the same as intending to imply that Colborn planted evidence. Nor is Manhardt's desire to make the audience feel guilty a smoking gun. The audience could feel guilt without the producers intending to imply that Colborn executed a frame job. Stone did not work for the producers, and his decision to use a squirmy shot does not suffice to show intent to imply criminal conduct anyway. And discussing the possibility of retesting some evidence is in no way tantamount to admitting an intention to defame Colborn. (ECF No. 330-1 at 73.)

At most, this collection of emails suggests the producers' sympathy for Avery's plight. But even sympathy for the devil is not clear and convincing proof of actual malice toward the Holy Trinity. *See Saenz*, 841 F.2d at 1319. In fact, under Seventh Circuit precedent, a publisher can omit one side of a story's vehement denials without intending to distort or recklessly disregard the truth. *Id.* Here, the producers included Colborn's denials as well as clips tending to undermine Avery's claims. (ECF No. 294 at 38.) Furthermore, in interviews conducted contemporaneous to *Making a Murderer*'s release, Ricciardi and Demos said they were "not trying to provide any answers," did not "have a conclusion," and that "there are a lot of questions here." (ECF No. 294 at 40-41.) This undercuts any inference of defamatory intent or reckless disregard.

Ultimately, the case against Ricciardi, Demos, and Chrome bears a striking resemblance to defamation plaintiffs' failed gambits in *Woods* and *Saenz*. In the former, the Seventh Circuit rejected a claim of defamation by implication because the plaintiff failed to muster evidence of intent. *See Woods*, 791 F.2d at 487-88. The Court noted that "[t]he result . . . might be different if the [publication] could reasonably have only the meaning the plaintiff ascribes to it or if there was evidence that [the author] harbored ill-will for the plaintiff." *Id.* at 488. But in the absence of either circumstance, it was not enough that the statement at issue could reasonably "be read to contain a defamatory inference" because that did not mean that inference was "the only reasonable one" that could be drawn, nor did it mean "the publisher of the statement either intended the statement to contain such a defamatory implication or even knew that readers could reasonably interpret the statement to contain the defamatory implication." *Id.* at 486. Like the plaintiff in *Woods*, Colborn lacks evidence of intent or reckless disregard, and he also cannot show that *Making a Murderer* has only one reasonable interpretation or that the producers were motivated by ill-will. In *Saenz*, the defamation plaintiff demonstrated only that the article in question was "capable of supporting false and defamatory implications of which [the publishers], according to

their uncontradicted affidavits, were unaware." 841 F.2d at 1319. It did not even matter that one of the authors uttered words that might have indicated a belief in the alleged defamatory inference because that did not "constitute clear and convincing evidence that the defendants knew or intended the defamatory inferences that might . . . be drawn from their publication." *Id.* (citing *Liberty Lobby*, 477 U.S. at 256). Colborn's case against *Making a Murderer*'s producers is even weaker because he has nothing approaching evidence of Ricciardi's or Demos' subjective belief that he planted evidence against Avery.

In sum, a reasonable jury might conclude that *Making a Murderer* implied that Colborn framed Avery, but because Colborn has no evidence that Ricciardi, Demos, or Chrome intended that implication or recklessly disregarded its possible existence *with malice*, the producers are entitled to summary judgment.

As for the case against Netflix, Colborn again references manifold communications, only one of which remotely touches on actual malice:

- In notes sent to Ricciardi and Demos regarding Episode 1, Netflix's creative team asked: "Do we have any great family pictures of the Avery's here?" Netflix also suggested making "them look like a very happy family." (ECF No. 286-11 at 4.)
- Netflix told the producers that Episode 1 needed "a more explicit ending that makes it clear that in the next episode the cops are going to seek revenge." (ECF No. 286-9 at 5.)
- With respect to Episode 2, Netflix commented: "Seems very thin that Colburn [sic] not having specific knowledge of who called him [in 1994 or 1995] would be the key to the case." (ECF No. 286-11 at 7.)
- Netflix suggested adding Avery's father's quote: "They framed an innocent man just like they did 20 years ago" to the Episode 2 cliffhanger. (ECF No. 286-9 at 8.)
- After reviewing Episode 3, Netflix asked: "Is there anything we can use/show to clarify whether or not the cops had a warrant to search [Avery's] property and allude to the fact that they may have planted something when they were there without permission?" (ECF No. 286-11 at 9.)
- Netflix asked if the producers could "establish a subtle but impactful theme track for the baddies, e.g. Lenk, Petersen, Kratz and certainly for Len Kachinsky and Michael O'Kelly."[12] (ECF No. 286-9 at 36.) Netflix also labeled the scene where lead investigator Tom Fassbender called Dassey's parents and asked them to make him take a plea the "perfect moment for 'bad guy theme.'" (*Id.* at 64.)

[12] Attorney Kachinsky and private investigator O'Kelly worked on behalf of Brendan Dassey (Avery's nephew), who was also criminally charged in connection with Halbach's murder. *See* John Ferak, *Kachinsky, O'Kelly Paid $15K in Dassey Defense*, POST CRESCENT (Sept. 4, 2016, 6:03 PM), https://www.postcrescent.com/story/news/2016/09/04/kachinsky-okelly-paid-15k-dassey-defense/89763170/.

- Commenting on Episode 5, Netflix described a shot of Avery "looking a little smug," and suggested it "might be better to use a different shot." (ECF No. 286-12 at 3.)

Once again, most of these script notes fail to move the needle on actual malice. Implying the Averys were a happy family is not the same as implying that Colborn planted evidence. Similarly, underscoring Colborn's tenuous connection to Avery based on the 1994 or 1995 phone call has nothing to do with implying a frame-up. That Netflix wanted to use Avery's father's quote as a cliffhanger does not prove that it intended to imply the truth of that quote. Asking if the producers had anything that could "allude to the fact that [the cops] *may* have planted something" demonstrates that Netflix only wanted to imply the *possibility* of a frame-up and, even then, only evidence-permitting. And suggesting using theme music for characters other than Colborn and removing a shot of Avery looking smug have no bearing on whether Netflix intended the defamatory implication Colborn alleges.

The one piece of evidence that raises an eyebrow is the creative team's suggestion to include a cliffhanger that "makes it clear that in the next episode the cops are going to seek revenge." (ECF No. 286-9 at 5.) Although "seeking revenge" does not necessarily entail executing a frame job, it does sound in that register. And while the note does not explicitly name Colborn, it requires no great logical leap to figure he is one of the referenced "cops." But given this note's lack of specificity, it falls short of clear and convincing evidence that Netflix intended the defamatory inference Colborn has drawn. Even if one gets past this burden of proof issue, two related problems conclusively foreclose Colborn's claim at summary judgment.

First, just as private communications can illuminate ulterior, defamatory motives, so too can they undercut allegations of defamation. In this case, an email exchange between Del Deo and Cotner provides considerable insight into Netflix's state of mind and undercuts the inference of defamatory intent:

> DEL DEO: In this sequence, it feels like Jerry Buting, on an almost definitive basis, is accusing the officers. Although I think the officers have the strongest motive, I think Jerry's statement come[s] across a[s] fact[….] [T]hey thought, for sure, [']we're going to make sure he's convicted.' It may be worth soften[ing] his statement so it doesn't come across so subjective.
>
> COTNER: I am kind of worried that this note goes contrary to the direction we've been pushing [the producers] in. I've been under the impression that we are desperate to say that someone else could have done it. I'm afraid that if we tell them to soften something it

> is going to really confuse the filmmakers. Is there a specific element that you think is overly subjective? I don't think subjective is necessarily bad, but if it is completely unfounded then you might be right.
>
> DEL DEO: I think the statement as [Buting] currently communicates it comes across, to me, as a matter of fact the officers did it (as oppose[d] to highly likely they did it). In other words, I think if [Buting's] statement involving the officers can come across as a highly possible/very likely scenario (since the officers had a very strong motive to kill Steven) it would be convincing that someone else, most likely one of/some of the officers were involved. I think we're saying the same thing. However, I just wanted to make sure [Buting] isn't saying the officers killed as a matter of pure fact since there's no physical evidence to really prove the officers were there, rather just very strong motive. Take a look at [Buting's] statement again and see if you agree.
>
> COTNER: I think it is a really valid point but I would rather leave it for now – it is something we can always pull out later, but I am so happy that they finally have a point of view. I hope people know that it is just a theory …"

(ECF No. 330-1 at 50-51.) In this conversation, two of the four members of Netflix's creative team express an affirmative desire to exclude unfounded allegations. Cotner also expresses his hope that viewers know the frame-up accusation "is just a theory." In *Saenz*, the Seventh Circuit held that similar internal communications "tend[] to support the defendants' contention that they did not intend or believe that" their publication contained the complained of defamatory implication. *Saenz*, 841 F.2d at 1319. In other words, Del Deo's reluctance to include a statement that conforms with his personal beliefs but lacks substantiation undercuts the idea that the "seek revenge" quote proves defamatory intent. The same goes for Cotner's "just a theory" remark.

In addition, as a matter of law, Netflix exhibited actual malice only if it intended to imply a defamatory, *materially false*, and unprivileged statement. But even if Netflix intended to imply that Colborn planted evidence, Colborn has no evidence that Netflix knew that statement to be false. "[K]nowledge of falsity held by a principal cannot be imputed to its agent." *Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865, 868 (7th Cir. 2018) (citing *Sullivan*, 376 U.S. at 287). No one on Netflix's creative team ever spoke to anyone depicted in *Making a Murderer*. (ECF No. 269 at 18.) They never even watched the raw trial footage, instead relying solely on the cuts the producers provided. (*Id.*) Colborn himself admitted under oath that those who did not attend Avery's criminal trial could not have known what occurred there, including former Assistant District

Attorney Michael Griesbach, who has written three books on the subject. (*Id.* at 19.) By that logic, a handful of Netflix employees with no legal education and limited exposure to trial testimony cannot possibly have understood the intricacies of the case.

Unhappy with the legal implications of his own sworn testimony, Colborn argues that Netflix assumed the risk of a defamation suit when it published *Making a Murderer* without a thorough factcheck. This misstates the law. A publisher is "under no obligation to check [a producer's] facts at all, unless something blatant put[s] them on notice that [the producer] was reckless about the truth." *Saenz*, 841 F.2d at 1319 (quoting *St. Amant*, 390 U.S. at 731-32). In *St. Amant*, the United States Supreme Court collated a list of warning signs that trigger a publisher's duty to investigate:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732. Here, Colborn has failed to prove the existence of any such improbabilities or inconsistencies. He has not even managed to show that the producers bore him ill-will, and that, in and of itself, is insufficient notice under *St. Amant*. *See Saenz*, 841 F.2d at 1319.

In the end, Colborn's turn in *Making a Murderer* may not have been to his liking, but that does not make it defamatory. Few aspire to enter the cultural zeitgeist on such controversial terms. That possibility, though, is a necessary byproduct of the freedom of press that the First Amendment protects. If media could portray us only at our best, we would be a country of antiseptic caricatures, and less intelligent for it. We have not sunken so low just yet.

II. Colborn's Intentional Infliction of Emotional Distress Claim Also Fails.

Colborn also seeks to recover for Defendants' alleged intentional infliction of emotional distress. Under Wisconsin law, this claim requires proof of four elements: "(1) that the defendant's conduct was intentioned to cause emotional distress; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct." *Rabideau v. City of Racine*, 627 N.W.2d 795, 803 (Wis. 2001) (citing *Alsteen v. Gehl*, 124 N.W.2d 312 (Wis. 1963)). But there is no reason to exhaustively engage each

of these predicates. "[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Colborn failed to establish actual malice in his defamation case, so his intentional infliction of emotional distress claim likewise cannot survive.

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant Netflix, Inc.'s Motion for Summary Judgment, ECF No. 268, is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Laura Ricciardi's, Moira Demos', and Chrome Media LLC's Motion for Summary Judgment, ECF No. 282, is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Andrew L. Colborn's Motion for Partial Summary Judgment, ECF No. 284, is **DENIED**.

Dated at Milwaukee, Wisconsin on March 10, 2023.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

Applicant Details

First Name	**A**
Last Name	**Russell**
Citizenship Status	**U. S. Citizen**
Email Address	**amr458@cornell.edu**
Address	**Address** **Street** **217 E 7th St, Apt 5C** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11218** **Country** **United States**
Contact Phone Number	**7177159655**

Applicant Education

BA/BS From	**Haverford College in Pennsylvania**
Date of BA/BS	**May 2014**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 14, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Cornell Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience **Immigration**

Recommenders

McKee, Estelle
emm28@cornell.edu
(607) 255-5135
Rachlinski, Jeffrey
jjr7@cornell.edu
607-255-5878

This applicant has certified that all data entered in this profile and any application documents are true and correct.

A. Russell
217 E 7th Street, Apt. 5C
Brooklyn, NY 11218
amr458@cornell.edu
(717) 715-9655

June 11, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

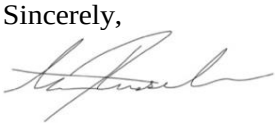
Dear Judge Robinson:

I am writing to apply for a clerkship in your chambers for the 2024–25 term. I graduated from Cornell Law School in 2022 ranked number 3 in my class and am currently completing a public interest fellowship in immigration law with New York Legal Assistance Group (NYLAG). I already have a district court clerkship beginning in 2025, but I am now seeking an appellate court clerkship as well. I hope to ultimately pursue a career in both academia and LGBTQIA+ advocacy, and I would deeply value the insight into federal appellate decision-making that I would gain from working for you. I am impressed with your long history of advocacy for the LGBTQIA+ community, and I know that I would benefit greatly both personally and professionally from the opportunity to learn from you. It would be an honor to be one of your clerks.

In addition to the research, writing, and analytical skills reflected in my other materials, I believe I also bring skills developed by my experiences outside of school. As a theater director with my own company prior to law school, I worked with community members to write and perform original pieces about their lives and the issues they cared about. Now as an H.T. Rhodes Public Interest Law Fellow at NYLAG, I assist transgender, nonbinary, and gender nonconforming immigrants with asylum applications, removal defense, and U and T visa applications. Through these experiences, I believe I have learned to collaboratively write, tell compelling stories, listen to and support perspectives not my own, quickly assess fact patterns according to existing law, identify possible legal arguments and areas of changing law, and manage many moving pieces to meet tight deadlines—all skills that I believe would help me better perform my work as a clerk.

Included with this letter are my current resume, law school transcript, undergraduate transcript, and writing sample. Letters of recommendation from Cornell Law School Professors Rachlinski and McKee will follow. Please do not hesitate to contact me at the above address or telephone number if you should need any additional information. Thank you for your consideration.

Sincerely,



A. Russell

A. RUSSELL (they/them pronouns)
217 E 7th St., Apt. 5C, Brooklyn, NY 11218 | (717) 715-9655 | amr458@cornell.edu

EDUCATION

Cornell Law School Ithaca, NY
Juris Doctor, *magna cum laude* May 2022
GPA: 4.0098 - ranked number 3
Concentration: Law, Inequity, and Structural Exclusion
Honors: Order of the Coif
Cornell Law Review, *Volume 107 Senior Notes Editor*
Fraser Prize for superior scholarship and character
CALI Awards:
- Contracts
- Lawyering (first year legal research and writing course)
- Social Science & the Law
- Evidence
- Advocacy for LGBT Communities Practicum
- Animal Rights
- Asylum and Convention Against Torture Appellate Clinic
- Gender Justice Clinic
- Transgender People and the Law

Dean's List (all semesters)
Publication: *Bostock v. Clayton County: The Implications of a Binary Bias*, Cornell Law Review, Vol. 106, No. 6, August 2021
Activities: Cornell OutLaw, *Co-President, 3L Representative, & 1L Representative*
Public Interest Fellowship Fundraiser, *2020 Cabaret Performance Director*
Moot Court: General Board Member & Diversity Committee Member
2021 Faust F. Rossi Moot Court Competition, *Round of 16*
2020 Cuccia Cup Moot Court Competition, *Quarterfinalist*
2020 Louis Kaiser Best Brief Competition, *Finalist*

Haverford College Haverford, PA
Bachelor of Arts in Theater, *magna cum laude* May 2014
GPA 3.919
Major Focus: Directing & Acting *(Swarthmore tri-college program)*
Minor: Film & Media Studies *(Swarthmore tri-college program)*
Concentration: Gender and Sexuality Studies *(Bryn Mawr/Haverford bi-college program)*
Honors: Phi Beta Kappa
E. Berkeley Harris 1955 Scholarship Fund (2012, 2013 & 2014)
Activities: "United States of Play" theater club, *founder and head*
Chamber Ensemble/Orchestra, *principal violist*
Study Abroad: Humboldt University/IES, Berlin, Germany

EXPECTED EXPERIENCE

Judge Cathy Bissoon, U.S. District Court of the Western District of PA Pittsburgh, PA
Term Clerk in Judge Cathy Bisson's Chambers expected Aug 2025–Aug 2027
Will research and draft opinions for District Court Judge Cathy Bissoon in the Western District of PA.

PREVIOUS EXPERIENCE

Frank H. T. Rhodes Public Interest Law Fellowship New York City, NY
Fellow with New York Legal Assistance Group's LGBTQ Project Aug 2022–present
Represented transgender, nonbinary, and gender nonconforming immigrants in both affirmative and defensive immigration proceedings, nondiscrimination suits, name changes, and other cases, as needed.

Cornell Law School Ithaca, NY
Research Assistant Jun 2021–Aug 2022
Researched and wrote footnotes for Professor Sherry Colb's forthcoming article on *Fulton v. City of Philadelphia*. Researched 2nd article on religious opposition to abortion, trans rights, and assisted suicide.

Honors Fellow Aug 2021–May 2022
Assisted Professor Estelle McKee in teaching Lawyering (Cornell's required 1L writing class): supervised class writing and research, held student conferences, and helped grade and give feedback on all memos.

Teaching Assistant - Improv, Storytelling, and Trial Advocacy Aug 2021–Dec 2021
Assisted Professor George Higgins in teaching Improv, Storytelling, and Trial Advocacy to law students: helped develop class plans, led and demonstrated class exercises, and gave feedback to students.

Teaching Assistant - Psychology and Law Aug–Dec 2020
Assisted Professors Jeffrey Rachlinski and Valerie Hans in teaching undergraduate class Psychology and Law: led 20 students in weekly class discussion, held office hours, and graded 1 essay and 2 exams each.

Cornell Gender Justice Clinic Ithaca, NY
Participant Aug 2021–May 2022
Worked on a 6-person team: researched and edited human rights report for UN special rapporteur demonstrating negative impact of India's abrogation of Kashmir on women and LGBTQIA+ people.

Advocacy for LGBT Communities Practicum Ithaca, NY
Volunteer Lawyers Project of Central New York—LGBT Rights Program
Student Participant Sep–Dec 2020, Jan–May 2022
Provided direct legal services to indigent LGBTQ+ clients in upstate New York. Drafted and submitted name-change petitions for transgender individuals.

Transgender Law Center Oakland, CA
Impact Litigation Legal Intern Jun–Aug 2021
Researched and wrote memo analyzing U.S.'s potential motion to dismiss wrongful death suit on behalf of transgender asylum-seeker under discretionary function exception to Federal Tort Claims Act. Researched and helped develop novel legal theory holding federal contractors liable for disability discrimination under Rehabilitation Act § 504.

Asylum and Convention Against Torture Appellate Clinic Ithaca, NY
Student Participant Feb–May 2021
Worked on 3-person team to collectively research, draft, edit, and submit Second Circuit asylum appeal brief analyzing nuclear-family status, particular social group, nexus, past persecution, and relocation.

National LGBTQ Task Force Washington, DC
Holley Law Fellow Jun–Jul 2020
Analyzed impact of *Bostock v. Clayton County* on HUD's proposed anti-transgender amendments to Equal Access Rule. Researched and drafted public comment opposing rule change and helped coordinate comment-writing campaign against change. Researched and drafted mental health policy proposals to recommend to incoming Presidential administration. Collected research for covid-19 resource webpage.

Fulbright Student/Research Scholarship Gießen, Germany
Justus Liebig Universität Gießen – Institute for Applied Theater Science Sep 2018–Jul 2019
Researched theme: "'What Moves Us'—The Study of Political Theater Theory & Practice." Performed with refugee theater program. Wrote and performed one-person semi-autobiographical show.

Allentown Public Theatre Allentown, PA
Managing Artistic Director Jun 2015–Aug 2018
Managed small 501(c)(3) nonprofit company's fundraising, grant-writing, budgeting, and marketing as sole administrative staff member, and developed 6-person board. Directed company's artistic activities: designed annual 3-show seasons, wrote original plays, hired actors and crew, designed tech, and designed and taught children's programs for elementary through high school students. Partnered with community organizations to engage social justice issues through Theater of the Oppressed techniques.

ADDITIONAL INFORMATION

Languages: German (advanced—both written and spoken) and English (first language)
Interests: Viola, miming, commedia dell'arte, shadow puppetry, painting, hiking & Quakerism

Cornell Law School - Grade Report - 06/02/2022

Anna M Russell

JD, Class of 2022

Course	Title	Instructor(s)	Credits	Grade	
Fall 2019 (8/27/2019 - 12/23/2019)					
LAW 5001.4	Civil Procedure	Holden-Smith	3.0	B+	
LAW 5021.3	Constitutional Law	Rana	4.0	A-	
LAW 5041.3	Contracts	Rachlinski	4.0	A+	CALI
LAW 5081.4	Lawyering	Kelley-Widmer	2.0	A	CALI
LAW 5151.3	Torts	Wendel	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8125
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8125

^ Dean's List

Spring 2020 (1/14/2020 - 5/11/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 5001.2	Civil Procedure	Clermont	3.0	SX	
LAW 5061.1	Criminal Law	Garvey	3.0	SX	
LAW 5081.4	Lawyering	Kelley-Widmer	2.0	SX	
LAW 5121.1	Property	Sherwin	4.0	SX	
LAW 6822.1	Social Science and the Law	Hans	3.0	SX	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	0.0	0.0	N/A
Cumulative	31.0	31.0	31.0	31.0	16.0	16.0	3.8125

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6401.1	Evidence	Colb	4.0	A	CALI
LAW 6861.601	Supervised Teaching	Hans/Rachlinski	3.0	SX	
LAW 7178.101	Moral Foundations of Anti-Discrimination	Marmor	3.0	A+	
LAW 7905.301	Advocacy for LGBT Communities Practicum	Livingston	4.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	11.0	11.0	4.2100
Cumulative	45.0	45.0	45.0	45.0	27.0	27.0	3.9744

^ Dean's List

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6431.1	Federal Courts	Dorf	4.0	S	
LAW 6641.1	Professional Responsibility	Wendel	3.0	B+	
LAW 7072.101	Animal Rights	Colb	3.0	A-	CALI
LAW 7801.301	Asylum and Convention Against Torture Appellate Clinic	McKee/Yale-Loehr	4.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	10.0	10.0	3.8320
Cumulative	59.0	59.0	59.0	59.0	37.0	37.0	3.9359

^ Dean's List

Fall 2021 (8/24/2021 - 12/3/2021)

LAW 6011.1	Administrative Law	Stiglitz	3.0	B+	
LAW 6451.1	Federal Indian Law	Porter	3.0	A	
LAW 6881.651	Supervised Writing/Teaching Honors Fellow Program	Freed	2.0	SX	
LAW 7914.301	Gender Justice Clinic	Brundige/Lee	4.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	12.0	12.0	12.0	12.0	10.0	10.0	3.9310
Cumulative	71.0	71.0	71.0	71.0	47.0	47.0	3.9348

^ Dean's List

Spring 2022 (1/25/2022 - 5/2/2022)

LAW 6456.101	Transgender People and the Law	Young	3.0	A+	CALI
LAW 6457.1	Inclusion and Exclusion in American Law	Rana	3.0	S	
LAW 6881.651	Supervised Writing/Teaching Honors Fellow Program	Freed	2.0	SX	
LAW 7906.301	Advocacy for LGBT Communities Practicum II	Livingston	4.0	A+	
LAW 7915.301	Advanced Gender Justice Clinic	Brundige/Lee	4.0	A+	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	11.0	11.0	4.3300
Cumulative	87.0	87.0	87.0	87.0	58.0	58.0	4.0098

^ Dean's List

Total Hours Earned: 87

Received JD magna cum laude on 05/29/2022

Cornell Law School

Lawyers in the Best Sense

June 2022

Cornell Law School Grading Policy for JD Students
Faculty grading policy calls upon each faculty member to grade a course, including problem courses and seminars, so that the mean grade for JD students in the course approximates 3.35 (the acceptable range between 3.2 and 3.5). This policy is subject only to very limited exceptions. †

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

Class Rank
As a matter of faculty policy, we do not release the academic rankings of our students. Interested individuals, including employers, have access to the top 10% approximate cumulative grade point cut off for the most recent semester of completion. In addition, at the completion of the students second semester and every semester thereafter the top 5% approximate cumulative grade point average is also available. In general students are not ranked however the top ten students in each class are ranked and are notified of their rank.

Class of 2022 [six semesters]:
5% - 3.9105; 10% - 3.8448
Class of 2023 [four semesters]:
5% - 3.9169; 10% - 3.7964
Class of 2024 [two semesters]:
5% - 3.9175; 10% - 3.8240

Dean's List
Each semester all students whose **semester** grade point average places them in the top 30% of their class are awarded Dean's List status. Students are notified of this honor by a letter from the Dean and a notation on their official and unofficial transcripts.

Myron Taylor Scholar
This honor recognizes students whose cumulative MPR places them in the top 30 percent of their class at the completion of their second year of law school. Students are notified of this honor by a letter from the Dean of Students.

Academic Honors at Graduation
The faculty awards academic honors at graduation as follows: The faculty awards the J.D. degree summa cum laude by special vote in cases of exceptional performance. The school awards the J.D. degree magna cum laude to students who rank in the top 10% of the graduating class. Students who rank in the top 30% of the class receive the J.D. degree cum laude unless they are receiving another honors degree. For the graduating Class of 2022, the GPA cut off for magna cum laude was 3.8448 and for cum laude was 3.6874. Recipients are notified by a letter from the Dean and a notation on their official and unofficial transcripts.

The Order of the Coif is granted to those who rank in the top 10% of the graduating class. To be eligible for consideration for the Order of the Coif, a graduate must be in the top 10% with 75% of credits taken for a letter grade.
Note: Due to the COVID-19 public health emergency resulting in Spring 2020 courses being graded on a mandatory S/U basis, Spring 2022 criteria for Order of the Coif eligibility has been adjusted to 75% of graded coursework within 5 semesters. (The Order of the Coif is a National Organization that sets its own rules.)

† Prior to fall 2018, faculty who announced to their classes that they might exceed the cap were free to do so. If the 3.5 cap was exceeded in any class pursuant to such announcement, the transcript of every student in the class will carry an asterisk (*) next to the grade for that class, and for various internal purposes such as the awarding of academic honors at graduation, the numerical impact of such grades will be adjusted to be the same as it would have been if the course had been graded to achieve a 3.35 mean.

For detailed information about exceptions and other information such as grading policy for exchange students please go to the Exam Information & Grading Policies link at http://www.lawschool.cornell.edu/registrar/.

Cornell Law School

ESTELLE M. MCKEE
Clinical Professor of Law (Lawyering)

251 Hughes Hall
Ithaca, New York 14853-4901
T: 607.255.5135
F: 607.255.7193
E: emm28@cornell.edu

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals
for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

It is my great pleasure to recommend Anna Russell (who goes by "Russell" and prefers "they/them" pronouns) for a clerkship in your chambers. In my thirteen years of teaching law students, I have met many intelligent, diligent, and motivated students. But Russell is one of just a handful at the very top. They are truly exceptional. I have no doubts that a brilliant career in academia or on the bench awaits them.

I know Russell through their participation in the Asylum and Convention Against Torture Appellate Clinic, which I co-direct. We accept only eight students per semester, four of whom work in teams of two to represent clients in petitions for review in federal court. Russell and their teammate produced one of the finest briefs we have seen in the clinic, and they led one of the most productive case rounds, in which the class discussed appellate strategy and arguments. This brief was so impressive that my co-counsel, an experienced immigration attorney at a non-profit in New York City, repeatedly stated how impressed she was with their work.

For this brief, Russell researched and wrote on a complex asylum claim. A person is eligible for asylum if she has a well-founded fear of persecution on account of a protected ground, such as race, religion, and a few other categories, including the person's "particular social group." In our case, the Board of Immigration Appeals had concluded that a gang's persecution of our client as a means of revenge on her husband—a non-protected ground for asylum—precluded our client from establishing persecution on account of the "nuclear family" particular social group—a protected ground. Because the Second Circuit has no binding authority on the issue, Russell relied on persuasive authority, which they deftly synthesized into a powerful argument. Russell also addressed difficult issues regarding whether the client suffered past persecution and whether she could reasonably relocate to avoid persecution. Not only did Russell efficiently and comprehensively complete the legal

research, they also marshaled facts buried deep in a five-volume record to support their arguments. And they handled a last-minute argument I threw at them with grace and efficiency, never showing any unhappiness at the sudden addition to their already heavy workload. Their attention to detail enabled their team to produce a cogent and compelling brief. Russell's writing is not just lucid, it is concise—a rare trait in legal writing, even for experienced attorneys. And somehow their writing springs forth fully formed, so that I have little critiquing to do, even on early drafts!

Further, Russell and their teammate worked smoothly and efficiently. Together, they set deadlines, submitted numerous drafts and research outlines, and critiqued each other's drafts so that the final brief was a coherent whole. Their team worked like a well-oiled machine. Throughout this process, Russell remained humble and always open to learning, treating other students' comments on the brief seriously and handling critiques with grace. Russell and their teammate were truly outstanding (privately, I called them my "Dream Team"). I have high hopes that our client will succeed, but if not, it won't be because of this brief.

Russell is also an unusually thoughtful student. Their compassion and sensitivity towards our client impressed me. For example, Russell asked near the start of the semester if they should use the name "Anna," since the client, who was from Central America, might be put off by the name "Russell" or their reference to themselves using a gender-neutral pronoun. (I advised them that they did not need to change their name or identity for a client, and it turned out not to be a problem at all). I was impressed by Russell's empathy towards our client and their awareness of potential intercultural issues.

I also teach Lawyering, a legal-writing course for first-year law students at Cornell. I was thrilled when Russell applied to be a Lawyering Honors Fellow (an intensive teaching assistant position) for the 2021–2022 academic year, and I have not been disappointed. Their work has been invaluable. I rely on my Honors Fellows to provide honest feedback on my teaching and assignments, and to provide ideas for coursework to help students learn the material. Russell's thoughtful critiques of student writing, careful analysis of my teaching, and Russell's own instruction in legal citation and oral argument preparation significantly improved my course. The students uniformly raved about Russell's guidance.

This is a far longer letter than I normally write for clerkship recommendations, but Russell warrants it. Russell's phenomenal writing and analytical skills, diligence, and enthusiasm for the work cannot be summarized in anything less. I have enjoyed their gentle sense of humor, calm demeanor, and honesty. They will be an extraordinary asset to any chambers fortunate enough to have them as a clerk.

Please contact me if I can provide further assistance. My cellphone number is 607-280-7665.

Regards,

Estelle M. McKee
Clinical Professor of Law (Lawyering)

Cornell Law School

JEFFREY J. RACHLINSKI
Henry Allen Mark Professor of Law

122 Myron Taylor Hall
Ithaca, New York 14853-4901
T: 607.255.5878
F: 607.255.7193
E: jjr7@cornell.edu

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals
For the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write on behalf of Anna Russell, in support of an application for a clerkship with you. I am truly delighted to write this letter. Let me give you the bottom line at the outset: Russell is one of the best candidates for a clerkship that I have seen in my 27 years of teaching at Cornell Law School. I hired Russell myself and I would do so again.

I was impressed with Russell from the first time we met. Russell was enrolled in my 1L Contracts class. This was their first law school class. I called on several students and, as is my norm, used last names preceded by "Mr." or "Ms." After the class, Russell approached me and indicated that they identify as gender non-binary and politely asked that I use neither Mr. nor Ms. when I called on them in class. They requested that I refer to them as "Anna." I told them that I strongly believe both that students control their identity and that I would use whatever honorific or pronoun they prefer, but that I also believe in using last names. The formality maintains a decorum in the classroom that I find pedagogically productive. This posed a dilemma for Russell because it meant I would not call them "Anna." Russell stated that they understood my approach and made no suggestion that I change my classroom norms for them. After a discussion, we agreed on "Russell"; they left the room with a polite smile at the resolution.

It is striking to me, as I look back on it, that our initial discussion was not remotely awkward. I can take no credit for that. I had never had an openly non-binary student in class before. For their part, Russell was accustomed to being called Anna, having come from a background in theater in which first names are apparently the norm. Russell put me completely at ease, however, and completely understood why I would not use their first name. I told them that I was not likely to slip up on omitting the honorific but would probably stumble on the use of a gender-neutral pronoun. I was correct that occasionally I do stumble and use a gendered pronoun to refer to them. Russell never makes me feel awkward about occasional stumbles, however. Russell never even really corrects me; I simply apologize and we move on. Russell rightly insists on their identity but recognizes that people of good will accustomed to gendered pronouns will sometimes slip. Russell is a polite, mature individual and their identity is simply not an issue that gets in the way of a

professional interaction. Simply put, they make it easy for everyone around them to let Russell be who they are.

Russell was a delight to have in class. In a class of 30 students, Russell quickly become my "go to" person when the class got stuck. While Contracts is really not their core subject, they are deeply intellectually curious and engaged the material thoroughly. Russell is surely destined to be a civil-rights advocate, and, frankly, humanities majors often have difficulties with Contracts. Not so with Russell. They have a nimble legal mind that absorbs any subject quickly. Russell always had great answers when I called on them, but they also asked marvelous, probing questions in class. Russell was a frequent visitor to my office hours as well. In our discussions, they easily made connections across areas of law which is unusual in a 1L. They have the ability to see the law holistically, without the myopic focus that most 1L students need to get through their classes. I was not surprised to learn that Russell's GPA puts them near top of the class.

I offered Russell a position as a teaching assistant for an undergraduate class that I co-teach. To me, the best thing I can say about a candidate in a letter of recommendation is that I hired them myself—and I did. Their maturity, intellectual capabilities, and approachable demeanor convinced me that they would do a great job. Russell exceeded all expectations. They completed every grading assignment on time (which I certainly expected) and were thoroughly prepared to lead the discussion sections we arranged for the TAs for every class (taught on Zoom). Even better, Russell helped me prepare one of the classes on the Bostock case, which extended Title VII protection to transgender and homosexual individuals. I knew they were writing a note on the subject and asked to meet with them about that class. Our discussion was incredibly helpful. I taught the class exactly the way Russell suggested. It is extremely rare for a student to have that kind of an influence on my teaching or scholarship, but Russell is that rare student from whom I learned a great deal.

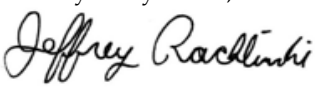
Russell has since written an incisive note on the Bostock case that explains much of their thinking on the subject. The note explains that the Bostock decision likely provides no protection against discrimination in the workplace to non-binary individuals. They carefully explain how the textualist reasoning in the opinion limits the scope of the opinion. Their analysis is almost certainly correct. Furthermore, Russell attributes some of the limitations of the opinion to how the parties argued the case. Interestingly, Cornell just hired a new faculty member who independently made some comparable arguments, which greatly impressed our hiring committee. Russell thus expresses lawyerly skills that are comparable to our entry-level faculty candidates. Although Russell also clearly has a position on the issue of protection for non-binary individuals, they are careful to ground their policy arguments in the existing statutes and precedent. The piece is also marvelously clearly written.

Russell is on their way to becoming an excellent lawyer. Their intellectual curiosity, work ethic, engaging personality, passion for advocacy, and flat-out brilliance will all serve their clients extremely well. Russell is not aspiring to work for a large firm; they want to be

an advocate for civil rights for LGBTQ people. It would not surprise me to see the name "A. Russell" listed as the lead counsel in one or more important civil rights cases in the next ten years.

In short, I highly recommend Russell to you. It is rare that I can say this, but you will learn something from having them in your chambers. You simply will not find a more engaging, hard-working, insightful person to hire as a clerk. I urge you at the very least to interview them to see for yourself. Please do not hesitate to contact me if you have any questions.

Very Truly Yours,



Jeffrey J. Rachlinski
Henry Allen Mark Professor of Law

A. RUSSELL (they/them pronouns)
217 E 7th St., Apt. 5C, Brooklyn, NY 11218 | (717) 715-9655 | amr458@cornell.edu

WRITING SAMPLE

The following is an excerpt from the note I wrote for Cornell Law Review in January 2021. The Law Review has since published this note; however, the version contained in this excerpt has not been edited by anyone other than me and represents my exclusive work.

This note was originally 34 pages long. To keep this excerpt brief, I have cut the Introduction, part of the Background section, and the Conclusion section. I have instead included here the first part of the Background section and most of Part III—the Analysis section—absent its final subsection.

The topic of my note focuses on the extent to which the Supreme Court's decision in *Bostock v. Clayton County* extending Title VII sex discrimination protections to those in the LGBTQ+ community would apply to nonbinary people. In the excerpt that I have included here, I first give some background information about nonbinary identity and the range of sex and gender variance discussed in my note. I have cut the second part of the Background section explaining the pattern of nonbinary erasure in transgender case law leading up to *Bostock* and instead jumped straight into explaining the problems that the Court's decision presents for nonbinary plaintiffs. Finally, I analyze the ways in which nonbinary people may nonetheless be able to utilize the decision to access anti-discrimination protection, as well as the advantages and disadvantages of each approach.

II. Background

A. Sex and Gender Variance

Like most people, the Supreme Court in *Bostock v. Clayton County* simply assumed that "sex" refers to a simple distinction between male and female biology;[1] however, the reality is much more complicated. In fact, multiple different biological characteristics play into what we understand as sex, including "'genetic or chromosomal sex, gonadal sex, internal morphologic sex, genitalia, hormonal sex, phenotypic sex, assigned sex/gender of rearing, and self-identified sex.'"[2] For some people, all of these criteria may align in one binary direction or another; for others, they may not.[3] Sex assigned at birth thus simply marks a physician's cursory examination of external genitalia, regardless of other sex characteristics.[4]

For transgender people, this initial cursory examination and subsequent sex assigned to them at birth is inconsistent with their internal sense of self.[5] According to the amicus curiae brief filed by the American Psychological Association (APA) in *Bostock*, "*[g]ender identity* 'refers to a person's basic sense of being male, female, or of indeterminate sex.'"[6] The APA

[1] *See* 140 S. Ct. 1731, 1739 (2020) (explaining that, although not at issue, the Court would assume for the purposes of its decision a definition of "sex" as "biological distinctions between male and female."). Note that because the Court failed to decide the definition sex, and because its assumed definition used language about biology, rather than anatomy, the opinion leaves transgender advocates open to argue for a definition of sex that is more closely linked to the biology of gender identity than to sex assigned at birth.
[2] Derek Waller, Note, *Recognizing Transgender, Intersex, and Nonbinary People in Healthcare Antidiscrimination Law*, 103 MINN. L. REV. 467, 475 (2018) (quoting Julia A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories, in Transgender Rights* 51, 56 (Currah et al. eds., 2006)).
[3] *Id.*
[4] *Id.* at 474.
[5] *See id.* at 489.
[6] Brief of The American Psychological Ass'n et al. as Amicus Curiae in Support of the Employees at 8, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (quoting

further specifies that "*[t]ransgender* people have a gender identity that is not aligned with the sex assigned to them at birth."[7] "Transgender" is thus not necessarily itself a gender identity, but rather an umbrella term referring to a wide range of gender identities, including those that are nonbinary.[8] As the APA explains, "'nonbinary' . . . [is] a term 'used to describe a gender identity outside of the gender binary (man versus woman).'"[9] Another umbrella term, nonbinary gender includes people who may identify with a range of different gender identities, such as "neutrois, bigender, genderfluid, androgyne, or agender, or with a more general label, such as genderqueer or non-binary."[10]

There are consequently many different ways of being transgender and many different ways of being nonbinary, each of which may reflect widely different understandings of the relationship between sex and gender.[11] Some transgender activists and medical professionals maintain that gender identity is influenced by biological factors in brain chemistry, and that gender identity is therefore actually another kind of sex characteristic.[12] Others may conversely view sex as culturally constructed and itself a reflection of gender.[13] Some may see themselves

American Psychological Ass'n, *Report on the APA Task Force on Gender Identity and Gender Variance* 28 (2009)).
[7] *Id.* at 9–10.
[8] Waller, *supra* note 2, at 479. However, not all nonbinary people identify as transgender. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897–98 (2019).
[9] Brief of The American Psychological Ass'n, *supra* note 6, at 9 n.14 (quoting J. Drescher et al., *Lesbian, Gay, Bisexual, and Transgender Patients, in American Psychiatric Press Textbook of Psychiatry* App'x 1211 (L.W. Roberts ed., 7th ed. 2019)).
[10] Katie Reineck, Note, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Gender Non-Binary People*, 24 MICH. J. GENDER & L. 265, 266 (2017).
[11] *See id.*; Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 886 (2020).
[12] Schoenbaum, *supra* note 11, at 866–67.
[13] *See id.* at 843.

as seeking to align their sex and gender.[14] Others may express discomfort with the narrative of being trapped in the wrong body and see no disconnect whatsoever between their sex and gender, outside of society's understanding of it.[15] Still others may feel themselves to be gender nonconformers, whose gender expression diverges from their sex or gender identity.[16] With such a constellation of diverse, overlapping, divergent, and shared identities and experiences within both the transgender and nonbinary communities,[17] the law's narrow understanding of transgender identity has resulted in unequal and compromised protection for each.

III. Analysis

A. *Bostock* and Its Failure to Account for Sex and Gender Variance

The Supreme Court's decision in *Bostock v. Clayton County* both reflects and reinvents the patterns of nonbinary erasure present in the transgender case law leading up to it. First, although *Bostock* is the first case to reach the Supreme Court that directly addresses transgender rights (itself an amazing accomplishment), *Bostock* does not discuss nonbinary people.[18] Aimee Stephens, the transgender plaintiff involved in the case, was not nonbinary; therefore, the issue was not directly before the Court.[19] Consequently, despite several amicus curiae briefs

[14] *See id.* at 867–68. A person may still hold this perspective, even when they never undergo surgery, as is the case for many transgender people, including binary ones. *Id.* at 868 n.174.
[15] Clarke, *supra* note 8, at 921.
[16] *See id.* at 900, 915.
[17] *See id.* at 897 n.9 (recognizing the limitations of terminology to describe the complexity of gender identity).
[18] Karen Ocamb, *Williams Institute Panel Dissects 'Minesterial' and Other Problems with Landmark Bostock Jobs Ruling*, L.A. BLADE (Aug. 8, 2020), https://www.losangelesblade.com/2020/08/08/williams-institute-panel-dissects-ministerial-and-other-problems-with-landmark-bostock-jobs-ruling/.
[19] *See* Vin Gurrieri, *Questions About 'Nonbinary' Bias Linger After LGBT Ruling*, LAW 360 (June 19, 2020), https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling.

explaining the range of identities implicated by the issue,[20] the majority opinion fails to directly acknowledge any beyond the binary one before them.[21]

Additionally, Stephens's case, although argued on sex stereotyping grounds, did not challenge the gender-based dress code that her employers imposed.[22] Instead, Stephens's litigation team emphasized that when she informed her boss that she intended to transition and would begin presenting as a woman at work, they fired her simply because she was transgender, not due to her noncompliance with the dress code.[23] Indeed, she had no intention of disobeying the dress code; she merely wished to comply with the female requirements, rather than the male ones.[24] As in prior cases on behalf of binary transgender individuals, this presentation of the issue had the effect of distancing Stephens from both gender nonconformers and nonbinary individuals, whose conflict with gender-based dress codes might be seen as more subversive to the binary gender system.[25]

However, this presentation also allowed litigators to avoid the pitfalls of prior sex stereotyping case law by isolating transgender status itself as the reason for the discrimination, rather than gender expression.[26] Consequently, although the Supreme Court initially accepted

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[20] *See, e.g.*, Brief of The American Psychological Ass'n, *supra* note 6 ("*Gender identity* 'refers to a person's basic sense of being male, female, or of indeterminate sex.'").
[21] *See* Ocamb, *supra* note 18.
[22] Reply Brief for Respondent Aimee Stephens at 4, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 140 S. Ct. 1731 (No. 18-107), 2019 WL 5079990, at *4 ("Harris Homes fired Ms. Stephens because she is transgender and did not conform to Harris Homes's other sex-based stereotypes—not because of the dress code.").
[23] *Id.* at 3.
[24] Schoenbaum, *supra* note 11, at 835.
[25] *See* Reply Brief for Respondent Aimee Stephens, *supra* note 22, at 2 ("Finally, Petitioner's warning that ruling for Ms. Stephens would render all sex-specific rules and spaces invalid is unfounded. . . . Whether such sex-based rules impermissibly discriminate with respect to the terms and conditions of employment, or otherwise adversely affect individual workers, present different questions that are not at issue here.").
[26] Schoenbaum, *supra* note 11, at 882–83.

the case in part on the issue of sex stereotyping,[27] which had been the basis of the lower court's decision,[28] it did not end up deciding the case on sex stereotyping grounds at all;[29] instead, it chose to decide *Bostock* on purely textualist grounds.[30] Many in the queer community see this approach as superior, since it allows queer plaintiffs to directly claim antidiscrimination protection under Title VII, without having to inaccurately portray themselves as gender nonconformers or depend on the much less reliable sex stereotyping doctrine.[31] As a result of the decision in *Bostock*, transgender status itself is now explicitly protected under sex discrimination prohibitions, regardless of any sex stereotyping or gender nonconformity that may also be present in the case.[32] For binary transgender people, this means likelier success in cases contesting incorrect categorization as male or female, even when a plaintiff's gender expression is not nonconforming.[33]

For nonbinary people, however, the Court's textualist reasoning may also present new problems. Although the Court explicitly uses the word "transgender" in its holding[34]—which, under a literal reading, should technically include nonbinary people—the reasoning the Court uses to arrive at this holding does not clearly apply to nonbinary individuals.

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[27] R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599, 1599 (2019), *granting cert. to*, 884 F.3d 560 (6th Cir. 2018).
[28] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576 (6th Cir. 2018) ("[D]iscrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping.").
[29] *See* Schoenbaum, *supra* note 11, at 881–82.
[30] *Id.* at 835 n.18.
[31] *See, e.g.*, *id.* at 882–83 (describing how *Bostock*'s ruling, by avoiding the reasoning of sex stereotyping doctrine, will allow transgender plaintiffs to claim protections regardless of whether they engage in gender nonconforming behavior).
[32] *Id.* at 883.
[33] *Id.*
[34] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020).

First, the Court frames its entire analysis by assuming a definition of "sex" formulated exclusively in binary terms.[35] Although some bemoan the Court's decision in *Bostock* as redefining "sex" to include sexual orientation and gender identity,[36] this characterization of the Court's opinion—unfortunately for nonbinary people—is not in fact accurate. Instead, the Court merely redefined the meaning of *sex discrimination* to encompass discrimination against "homosexual or transgender" people as well.[37] When it came to the meaning of "sex" itself, however, the Court explicitly refrained from adopting an official definition of the term, noting that the question was not at issue in this case.[38] Instead, the Court decided simply to "proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."[39] While future litigation may challenge this definition as a way of broadening *Bostock*'s reach, the Court in *Bostock* did not itself take on this task. The resulting analysis is therefore premised in exclusively binary terms.

As a result of this binary framework, the reasoning that the Court uses to justify its opinion likewise excludes nonbinary people. To determine whether or not discrimination against

[35] *See id.* at 1739 (assuming for the purposes of its analysis that "sex" refers "only to biological distinctions between male and female").
[36] *See, e.g.*, *id.* at 1756 (Alito, J., dissenting) (implying by his counterargument that the majority had redefined the word "sex," complaining that "[d]etermined searching has not found a single dictionary from that time that defined 'sex' to mean sexual orientation, gender identity, or 'transgender status.'"); Hans A. Spakovsky & Ryan T. Anderson, *Gorsuch Helps Transform the Supreme Court into the Supreme Legislature on LGBT Rights*, HERITAGE FOUND. (June 16, 2020), https://www.heritage.org/courts/commentary/gorsuch-helps-transform-the-supreme-court-the-supreme-legislature-lgbt-rights (" . . . Justice Neil Gorsuch has rewritten Title VII of the Civil Rights Act of 1964 to include sexual orientation and gender identity in the definition of 'sex.'").
[37] *Bostock*, 140 S. Ct. at 1744; *see also id.* at 1739 ("The question isn't just what 'sex' meant, but what Title VII says about it.").
[38] *Id.* at 1739 ("But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest . . . .").
[39] *Id.*

a sexual minority or transgender individual is discrimination "on the basis of sex," the Court applies a but-for test.[40] Although sex need not be the only reason for the discrimination, "so long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[41] As Justice Gorsuch clarifies, "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[42] Proceeding under this logic, Justice Gorsuch then applies the test to the plaintiffs involved in the case to see "if changing the employee's sex would have yielded a different choice by the employer . . . ."[43] Regarding the case's gay male plaintiffs, Justice Gorsuch decides that if they had been female, their employers would not have objected to their attraction to men and would not have discriminated against them.[44] Similarly, he decides that if Stephens had been assigned female at birth, her employer would likewise have had no objection to her identification as a woman and would not have subjected her to discrimination.[45] Justice Gorsuch therefore concludes that the test reveals that sexual orientation and gender identity are inextricably tied to sex, and "sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees . . . ."[46]

However, when applied to gender nonbinary individuals, this test seems to fall short. Since nonbinary people do not identify along the binary spectrum, a "change" to the individual's sex (by which Justice Gorsuch seems to mean sex assigned at birth) would not result in a change

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 1741.
[44] *Id.* ("If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.").
[45] *Id.* ("If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.").
[46] *Id.* at 1742.

to their status as nonbinary at all, and thus the employer's choice to discriminate.[47] The Court's test in *Bostock*, then, seems dependent on the plaintiff's binary transgender status. When applied to a binary transgender person, as it was in *Bostock*, the test's hypothetical change in sex results in a cisgender person against whom the employer would not have discriminated. However, when applied to a nonbinary person assigned female at birth, for instance, the test produces no such result. Such a person would be just as nonbinary (and presumably just as subject to discrimination), had they been assigned male at birth instead. Other scholars have noted a similar gap in this test's logic for bisexual people, whose sexuality is likewise not dependent on their own sex at all.[48]

Furthermore, the Court's reasoning beyond the but-for test does not clearly apply to nonbinary people either. To demonstrate that discrimination based on transgender status inherently includes discrimination based on sex, Justice Gorsuch addresses a hypothetical situation in which an employer screens for transgender applicants in its hiring process.[49] As Justice Gorsuch points out, even if the employer never meets a particular applicant and never knows the applicant's sex or gender, the simple knowledge that the applicant is transgender inherently involves some prior assessment of sex, whether by the employer or by the applicant

[47] However, if the employer in this hypothetical would view as cisgender an intersex person not assigned male or female at birth and who also identifies as nonbinary, and would accordingly not discriminate against them under an anti-transgender policy, this test could theoretically result in a change of status as transgender and affect the employer's treatment of the individual. Such a change in transgender status, however, would still not result in a change of nonbinary identity and would not affect the individual's treatment under a specifically nonbinary-exclusionary policy, or one that treats nonbinary people as automatically transgender. Additionally, the theoretical success of the test under this narrow loophole is extremely unlikely in practical terms, as no employer motivated to discriminate against transgender people in the first place is likely to make an exception for intersex people identifying as nonbinary.

[48] Michael Conklin, *Good for Thee, but Not for Me: How Bisexuals are Overlooked in Title VII Sexual Orientation Arguments,* 11 U. MIAMI RACE & SOC. JUST. L. REV. 33, 45 (2020).

[49] *Bostock,* 140 S. Ct. at 1746.

themselves.[50] Since one can only determine transgender status in relationship to sex assigned at birth, the fact of being transgender necessarily carries with it a prior assessment of sex, without which one could not be defined as transgender.[51]

However, this logic does not hold up as clearly for nonbinary people. Imagine that the employer has a policy of refusing to hire nonbinary applicants, but still hires binary transgender people. Unlike in Justice Gorsuch's example, the employer can take an applicant's status as nonbinary into account without any kind of prior assessment of their sex assigned at birth. Nonbinary identity, unlike transgender identity, is not defined in relationship to such assignment. Therefore, unless nonbinary identity itself can be defined as a type of sex,[52] the Court's logic here initially seems to fall short as well.

By basing its decision on a textualist framework, the Court in Bostock was able to avoid some of the pitfalls of prior sex stereotyping doctrine and extend direct protection to transgender status itself, without regard to gender nonconformity. However, since the Court also practiced nonbinary erasure in its decision and framed its textualist analysis in binary terms, nonbinary people may have a harder time reaping those benefits than binary transgender plaintiffs. With such ambiguity in the case's language, opponents wishing to limit the decision to its narrowest possible interpretation will likely attempt to argue that *Bostock*'s holding does not extend to nonbinary people.[53] Future nonbinary plaintiffs, though expected by experts to succeed in countering these arguments, will still likely be forced to justify why and how *Bostock* applies to

[50] *Id.*
[51] *Id.*
[52] As previously mentioned, some transgender advocates support the idea of gender identity as itself determining sex, regardless of sex assigned at birth or any other biological traits. *See* Schoenbaum, *supra* note 11, at 866–67.
[53] *See* Gurrieri, *supra* note 19.

them.[54] I argue that the language and tactics chosen by future litigators of nonbinary and binary transgender plaintiffs alike will therefore play an important role in shaping what nonbinary protections under *Bostock* will look like.

B. How Nonbinary People Can Leverage the *Bostock* Decision to Gain Protections

Despite the case's binary language, many experts agree that the ruling in *Bostock* will in fact extend antidiscrimination protections to gender nonbinary people.[55] However, the mechanism by which the decision will do so is not yet clear.[56] Transgender advocates have already begun proposing several possible theories, each with a slightly different framing, but it remains to be seen which one courts will likely accept.[57] In this section, I will present several of these theories as well as some of my own and analyze the potential ramifications of each for nonbinary people. I argue that each of these solutions, if not framed carefully, could still result in nonbinary people having less access to antidiscrimination protections under Title VII than their binary peers.

i. Nonbinary People Are Already Directly Included in *Bostock*'s Holding

Some transgender advocates argue that, since the literal holding of *Bostock* extends protections to those with "transgender status," nonbinary people, as part of the transgender community, are already technically included in that holding to exactly the same extent as binary

[54] *See id.*
[55] MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION §27:13 (Clark Boardman Callaghan ed., Dec. 2020 update) ("Although the opinion spoke of men and women in binary terms in light of the circumstances of the employees in the three cases, its analysis leaves no coherent way to exclude non-binary people from protections against sex discrimination.").
[56] *See* Gurrieri, *supra* note 19.
[57] *See id.*

transgender individuals.[58] A literal reading of the case's holding would therefore support the extension of its protections to gender nonbinary people, even if the reasoning justifying that holding does not perfectly apply.[59]

This argument makes good sense in that it is consistent with *Bostock*'s textualist approach to interpret its holding literally. Since similarly-situated binary and nonbinary transgender people can sometimes face exactly the same kinds of employment discrimination, both due to transgender status, courts would be hard-pressed to justify a decision to extend protections to binary but not nonbinary plaintiffs.[60] In such a scenario, discrimination against one can hardly be more based on sex than the other. Moreover, a literal interpretation like this has the benefit of most clearly and fully extending to nonbinary plaintiffs exactly the same rights that binary transgender people have under *Bostock* and making accessible to nonbinary people exactly the same mechanisms for invoking them.

However, the danger of this argument, if taken too literally, is that it could potentially undermine the cases of bisexual plaintiffs and other sexual minorities,[61] who, like nonbinary people, are also excluded from *Bostock* and so must justify why *Bostock* should apply to them.[62] As with nonbinary individuals, the Court's but-for analysis does not work for bisexual people, whose sexual identities and subsequent stigmatization are unaffected by a hypothetical change of

[58] *Id.* (explaining this theory as articulated by Ezra Young, the former director of impact litigation for the Transgender Legal Defense and Education Fund).
[59] *See id.*
[60] *See id.*
[61] Pansexual, asexual, and intersex people are also similarly situated, for instance.
[62] William N. Eskridge Jr. & Christopher R. Riano, *Bostock: A Statutory Super-Precedent for Sex and Gender Minorities*, AM. CONST. SOC'Y: EXPERT F. (July 1, 2020), https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities/.

sex.[63] However, bisexual people, unlike nonbinary people, are not included in the case's literal holding, as "homosexual" does not technically include them.[64] If nonbinary plaintiffs were to argue for a literal interpretation of the Court's use of the word "transgender," this argument could potentially undermine the ability of bisexual people and other sexual minorities to argue against a literal interpretation of "homosexual." Such an argument would need to be made with care to avoid such a result.

I suggest that a more holistic interpretive approach to *Bostock*'s text could offer a more flexible, inclusive, and ultimately stronger way to argue that nonbinary people are literally incorporated in the decision's holding. In combination with the holding's literal words, courts should also consider the overall intention, principles, and reasoning demonstrated throughout the opinion.[65] First, much of *Bostock*'s language seems to support a generous and flexible standard for sex discrimination, encouraging a similarly generous interpretation of the decision as applying to all queer identities, even if not explicitly named by the Court.[66] Additionally, since the Supreme Court has been slow to adopt other queer terminology in the past, such as gay and lesbian, its failure to explicitly use the word nonbinary in *Bostock* should not render the case

[63] Conklin, *supra* note 48.
[64] Nancy C. Markus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. 223, 225 (2020).
[65] *See* Gurrieri, *supra* note 19 (explaining that experts think "the spirit and language of the high court's ruling make it likely to cover workplace bias against people who identify as nonbinary or genderqueer").
[66] *See, e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739–40 (2020) (articulating a very generous causation standard supporting broad application of Title VII's protections with the explanation that ". . . Congress has . . . supplement[ed] Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision." (internal citation omitted)).

inapplicable to this identity.[67] The LGBTQIA+ world is full of developing terminology that most people outside of it may not be aware of or understand; the Court's choice of language to address only the identities before it could therefore merely have been the simplest way to articulate the decision, rather than an intentional repudiation of all other queer identities.[68] Any expectation that the Court would or could name all affected queer identities in its decision is unreasonable, and the fact that it did not do so does not preclude the case's application to all those reasonably implicated by its ruling.

ii. If Not Explicitly Listed, Title VII Has No Exceptions

Another theory suggests that *Bostock*'s holding prohibits courts from reading exceptions into Title VII, unless Congress explicitly included them.[69] While acknowledging that Congress may not have initially intended the word "sex" to include transgender and homosexual individuals,[70] the Court in *Bostock* insisted that Title VII has never been limited to Congress's initial vision.[71] For instance, as the Court points out, Congress never envisioned that Title VII would protect against sexual harassment or motherhood discrimination; yet courts have consistently incorporated these concepts into the statute's protections over the years, despite no textual indication that they should do so.[72] As the Court in *Bostock* explains:

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[67] *See* Gurrieri, *supra* note 19 (explaining through the perspective of LGBTQ lawyer Tracy Talbot that until very recently, terms like gay, lesbian, bisexual, and transgender were taboo to use in legal documents).
[68] *See id.*
[69] *See id.* (explaining through the words of Ezra Young, former director of impact litigation at the Transgender Legal Defense and Education Fund, that if courts do not accept the proposition that nonbinary people are literally included in the word transgender, then they may be able to convince courts that since *Bostock* did not exclude nonbinary people, they are included in its protections).
[70] *Bostock*, 140 S. Ct. at 1737
[71] *Id.* at 1747.
[72] *Id.*

> [There is not] any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exception to a broad rule, courts apply the broad rule. And that is how this Court has always approached Title VII.[73]

Therefore, since Congress included no explicit exception to Title VII for transgender people, let alone nonbinary people, courts cannot interpret the statute to exclude them.

Similarly, one could interpret the *Bostock* decision itself as creating no space for an exception to Title VII's protection of transgender people.[74] Because the Court did not explicitly exclude nonbinary people, lower courts cannot read such an exception into the case's holding.[75] This argument is especially persuasive, given the fact that the Court in fact had access to information about nonbinary individuals in some of the amicus curiae briefs that were submitted in this case.[76] If the Court was worried about including nonbinary people in its extension of protections to transgender individuals, it could have written an exception into its decision. Indeed, Justice Alito laments the absence of exactly such an exception in his dissent.[77] Since the

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[73] *Id.*
[74] *See* Gurrieri, *supra* note 19.
[75] *Id.*
[76] *See, e.g.*, Brief of The American Psychological Ass'n, *supra* note 6, at 9 (quoting L.M. Diamond et al., *Transgender Experience and Identity, in Handbook of Identity Theory and Research* 635 (S.J. Schwartz et al. eds., 2011)) ("[O]ne conceptual model of gender identity 'attempts to deemphasize the rigid gender binary that characterizes conventional models of gender identity development, and instead presumes the existence of parallel gender continuums inclusive of male and female dimensions. According to this model, individuals can strongly identify with both male and female dimensions, or with neither.'").
[77] *See Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (worrying that "while the Court does not define what it means by a transgender person, the term may apply to individuals who are 'gender fluid,' that is, individuals whose gender identity is mixed or changes over time. Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The

majority chose not to comment on the issue[78] when it was fully warned of the potential consequences, one can only assume that it never intended to exclude nonbinary individuals, and courts cannot read such an exception into its holding.[79]

However, while these arguments preclude the automatic exclusion of nonbinary people from *Bostock*'s coverage, they do not guarantee their inclusion either. If the lack of explicit exclusion from Title VII's coverage were enough to guarantee the right to invoke sex discrimination protections under it, there would be no limit to the people who could invoke it or the purposes for which they could do so, and the very idea of sex discrimination would have no meaning at all. Yet surely the inclusion of nonbinary plaintiffs—when so similarly situated to binary transgender people who are already clearly covered[80]—cannot possibly run the risk of pushing sex discrimination doctrine beyond recognition. Since these groups are already so similarly positioned, the lack of mention in *Bostock*'s decision likely indicates the Court's refusal to exclude them, rather than its refusal to include them.[81]

iii. Nonbinary Status Inherently Includes Consideration of Sex

I suggest further that any arguments for the direct inclusion of nonbinary people into *Bostock*'s holding can be strengthened by an interpretation of the Court's but-for reasoning that accommodates nonbinary individuals. Although, as I pointed out above, the Court's but-for analysis does not work in all circumstances when applied to nonbinary identity,[82] it also does not

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Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed." (internal citation omitted)).

[78] *See* Ocamb, *supra* note 18.

[79] *See* Gurrieri, *supra* note 19.

[80] *See id.*

[81] *See id.*

[82] *Cf. Bostock*, 140 S. Ct. at 1741 (describing the court's but-for test in binary terms).

preclude nonbinary people from claiming protections as transgender either.[83] Let us revisit the hypothetical in which the employer, as in Justice Gorsuch's example,[84] attempts to screen out nonbinary applicants. A nonbinary individual in this situation could claim that the employer is in fact discriminating against them because they are transgender—an identity which, as the Court already explained, inherently includes a consideration of sex.[85] Even if the employer does not discriminate against binary transgender people, its discrimination against nonbinary applicants could still constitute discrimination against transgender individuals, if only a subcategory of them. As Justice Gorsuch in *Bostock* clearly states, discrimination on the basis of a protected category need not affect all individuals belonging to that protected category in order to be unlawful.[86] As long as membership in the protected category makes up one but-for cause of the discrimination, that discrimination is unlawful.[87] Here, two factors are arguably at play: transgender status, which necessarily includes consideration of sex,[88] and nonbinary status, which has yet to be conclusively addressed by the courts. At the very least, transgender status (and consequently sex) makes up one but-for cause of the discrimination, rendering the

[83] *See* Gurrieri, *supra* note 19 (explaining that because, as Justice Alito points out, the Court did not exclude nonbinary people from the meaning of the word transgender, its holding in *Bostock* could apply to them).
[84] *See Bostock*, 140 S. Ct. at 1746.
[85] *Id.* at 1742 ("[H]omosexuality and transgender status are inextricably bound up with sex.").
[86] *Id.* at 1743 ("[A] rule that appears evenhanded at the group level can prove discriminatory at the level of individuals").
[87] *Id.* at 1739; *see also id.* at 1744 (explaining that a protected trait "need not be the sole or primary cause of the employer's adverse action"). As Justice Gorsuch explains, "Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision." *Id.* at 1742. Even if "some other, nonprotected trait . . . was the more important factor," the employer's actions can still be unlawful, as long as the protected trait played a contributing role in the adverse decision. *Id.* at 1744.
[88] *Id.* at 1742.

employer's actions unlawful. Although not all nonbinary people identify as transgender,[89] this analysis could at least lend strength to the claims of those that do.

Most convincing, however, is the argument that nonbinary status, just like transgender status, inherently necessitates a consideration of sex;[90] therefore, discrimination based on this trait likewise equally constitutes discrimination based on sex. This assertion finds support in part of Justice Gorsuch's own answer to his hypothetical, which includes an explanation that seems to anticipate extension to identities not strictly addressed in his example.[91] To determine if disclosure of a particular identity necessarily includes consideration of sex, Justice Gorsuch directs, "try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym)."[92] If, as for homosexuals and transgender people, "it can't be done," then discrimination based on that identity is discrimination based on sex.[93] Since nonbinary identity can only be defined in relationship to what it is not (i.e. strictly male or strictly female),[94] this test, at least, results in the inclusion of nonbinary individuals in Title VII's protections. By this logic, discrimination based on nonbinary status, just like that based on transgender status, must also be discrimination based on sex.

I argue that this justification for considering nonbinary identity as inherently based on sex is the strongest way for nonbinary plaintiffs to claim protections under *Bostock* on equal terms.

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[89] Clarke, *supra* note 8, at 897–98.
[90] *Cf. Bostock*, 140 S. Ct. at 1741–42 (explaining that identification of transgender status inherently includes consideration of sex).
[91] *See id.* at 1746.
[92] *Id.*
[93] *Id.*
[94] *See* Brief of The American Psychological Ass'n, *supra* note 6, at 9 n.14 (defining nonbinary identity as "'a gender identity outside of the gender binary (man versus woman)'" (quoting J. Drescher et al., *Lesbian, Gay, Bisexual, and Transgender Patients, in American Psychiatric Press Textbook of Psychiatry* App'x 1211 (L.W. Roberts ed., 7th ed. 2019))).

First, the justification directly relies on Justice Gorsuch's own logic.[95] Moreover, it would not exclude bisexual people, whose identity also cannot be defined without reference to the words "man, woman, or sex (or some synonym)."[96] Most importantly, such an argument would allow nonbinary plaintiffs to directly claim protection of nonbinary status under *Bostock* in exactly the same way binary transgender plaintiffs can.[97]

[95] As previously mentioned, discrimination based on nonbinary status qualifies as discrimination based on sex because it meets Justice Gorsuch's standard as an identity that can only be defined "using the words man, woman, or sex (or some synonym)." *Bostock*, 140 S. Ct. at 1746.
[96] *See* Brief of The American Psychological Ass'n, *supra* note 6, at 9 n.14 (defining bisexual identity as "having a significant degree of sexual and romantic attraction to both sexes").
[97] *Cf.* Schoenbaum, *supra* note 11, at 882–83 (describing how transgender status itself is now directly protected under *Bostock*, rather than gender expression only).

Applicant Details

First Name	**Emily**
Last Name	**Small**
Citizenship Status	**U. S. Citizen**
Email Address	**es2724a@american.edu**
Address	**Address** Street **1424 Belmont Street NW, Apt 4** City **Washington** State/Territory **District of Columbia** Zip **20009** Country **United States**
Contact Phone Number	**8478732780**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2018**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 20, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Beske, Elizabeth
beske@wcl.american.edu
202-274-4302
Hamilton, Rebecca
hamilton@wcl.american.edu
202-274-4241
Speier, Jackie
jackiespeier2007@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emily Small

Washington, D.C. | 847-873-2780 | es2724a@american.edu

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square, New York, NY 10007

Dear Judge Robinson,

I am a rising 3L at American University Washington College of Law writing to apply to be your law clerk for the 2024-2025 year. I believe that with my prior work and internship experience, my excellent research and writing skills, and my ability to work quickly and efficiently, I would excel at this position.

During my two prior judicial internships, I developed the skills necessary to be an exceptional law clerk. Last summer, I sharpened my legal research and writing skills while working for Judge Natasha Abel at the Equal Employment Opportunity Commission. While there, I drafted orders and responses to motions for summary judgment and participated in hearings. Judge Abel also trusted me to handle a particularly complex Title VII case on my own. For this case, I evaluated the parties' briefs, researched all the case law, analyzed the relevant statutes using the facts in our case, and drafted the response to the parties' motions for summary judgment. Through this opportunity, I mastered a particular area of law and learned to write in my Judge's unique voice.

This past fall I interned with Judge Patricia Millett at the Court of Appeals for the D.C. Circuit, where I further honed my legal research and writing skills. During this experience, I conducted legal research and prepared memoranda relating to upcoming cases, summarized and analyzed draft opinions, and participated in case discussions. I was often asked to research complex and novel legal issues while working efficiently to meet deadlines. On more than one occasion, my research led to a crucial case that the law clerks had not found. Additionally, in one instance, I acted as the sole law clerk for the Judge for a moot court competition. I prepared her bench memo, researched the relevant case law, and prepared questions for the Judge. I really enjoyed this opportunity to take on the role of a law clerk, work closely with the Judge, and gain knowledge about a complicated area of the law of which I was originally unfamiliar.

Additionally, my time working on Capitol Hill taught me how to meet tight deadlines while producing high-quality work. While working for Congresswoman Jackie Speier, I researched and evaluated legislative proposals, wrote memoranda about the proposals for the Congresswoman, and wrote letters regarding the proposals to the Congresswoman's constituents. Through these assignments, I developed my research skills and perfected succinctly analyzing dense pieces of legislation and effectively communicating them to a wide range of audiences. I also learned to be comfortable and effective working in a fast-paced, demanding environment, handling multiple legislative projects while also overseeing the interns in the office, answering constituent phone calls, and solving any administrative problems that unexpectedly arose.

I have further proven my ability to work effectively in a demanding environment while at law school. I have successfully balanced multiple teacher's assistant positions, a judicial internship, and law review assignments all while maintaining a 4.0 G.P.A.

I have included my resume, transcripts, writing sample, and letters of recommendation for your review. I believe that with the skill set I have cultivated in law school, on the Hill and through my judicial internships, I am an excellent candidate for this position. Thank you for your time and consideration.

Respectfully,
Emily Small

Emily Small

Washington, D.C. | 847-873-2780 | es2724a@american.edu

EDUCATION

American University Washington College of Law, Washington, D.C. May 2024
Juris Doctor Candidate | GPA 4.0 (Top 5%)
Journal: American University Law Review, *Senior Staffer*
Publication: Comment, *Beyond Duress: Supporting the Admissibility of Evidence of Battered Women's Syndrome to Aid the Defenses of Battered Mothers Charged with Failing to Protect Their Children Against Their Common Abuser*, Am. U. L. Rev. F. (Forthcoming 2023)
Honors: *Highest Grade Designations* in Legal Rhetoric: Writing and Research (Fall 2021); Torts (Fall 2021); Contracts (Fall 2021); Public Law (Spring 2022); Federal Courts (Spring 2023)
Awards: Dean's Merit Scholarship
Positions: *Teaching Assistant* in Civil Procedure (Fall 2022); Criminal Law (Spring 2023); Legal Rhetoric (Dean's Fellow – Fall 2022, Spring 2023)
Activities: Women's Law Association, *Member*; If/When/How, *Member*

University of Michigan, Ann Arbor, MI May 2018
Bachelor of Arts, Women's Studies and Psychology

EXPERIENCE

Covington & Burling LLP, Washington, D.C.
Summer Associate May 2023 – July 2023

United States Court of Appeals for the District of Columbia Circuit, Washington, D.C.
Judicial Extern for the Honorable Judge Patricia Millett August 2022 – November 2022
- Conducted legal research and prepared legal memoranda, summarized and analyzed draft opinions, and participated in case discussions with the Judge and law clerks

Equal Employment Opportunity Commission, Washington, D.C.
Judicial Intern for Administrative Judge Natasha Abel May 2022 – August 2022
- Conducted research and drafted legal memoranda detailing research and case law relating to Title VII, and ADA compliance for the Administrative Judge
- Drafted notices of intent, orders, and responses to motions for summary judgment
- Evaluated litigant's briefs
- Participated in hearings and settlement conferences

Office of Representative Jackie Speier (D-CA), Washington, D.C.
Press Assistant March 2020 – June 2021
- Drafted press releases and social media posts related to the Congresswoman's legislative priorities and committee work in the House Armed Services Committee, House Committee on Oversight and Reform and the House Permanent Select Committee on Intelligence.
- Coordinated press requests in support of the Director of Communications

Staff Assistant March 2019 – June 2021
- Managed the Congresswoman's animal welfare and arts and humanities legislative portfolios, including researching legislative proposals, meeting with advocacy groups, and drafting memoranda
- Handled key responsibilities relating to the women's rights legislative portfolio, including coordinating hearings for the Democratic Women's Caucus related to sexual harassment in the workplace, analyzing legislative proposals, and meeting with advocacy groups
- Drafted statements, formal correspondence, and constituent correspondence

ADDITIONAL INFORMATION

Interests: Reading novels and memoirs, playing pickleball, and watching college basketball

SMALL EMILY B 5212724 10/06

06/06/23 1 OF 1

FALL 2021

LAW-501	CIVIL PROCEDURE	04.00	A	16.00
LAW-504	CONTRACTS	04.00	A	16.00
LAW-516	LEGAL RESEARCH & WRITING I	02.00	A	08.00
LAW-522	TORTS	04.00	A	16.00

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 56.00QP 4.00GPA

SPRING 2022

LAW-503	CONSTITUTIONAL LAW	04.00	A	16.00
LAW-507	CRIMINAL LAW	03.00	A	12.00
LAW-517	LEGAL RESEARCH & WRITING II	02.00	A	08.00
LAW-518	PROPERTY	04.00	A	16.00
LAW-652	PUBLIC LAW	02.00	A	08.00

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 60.00QP 4.00GPA

FALL 2022

LAW-508	CRIMINAL PROCEDURE I	03.00	A	12.00
LAW-633	EVIDENCE	04.00	A	16.00
LAW-769	SUPERVISED EXTERNSHIP SEMINAR			
	EXTERNSHIP SEMINAR	02.00	A	08.00
LAW-796F	LAW REVIEW I	02.00	--	--.--
LAW-899	EXTERNSHIP FIELDWORK	03.00	P	00.00

LAW SEM SUM: 14.00HRS ATT 12.00HRS ERND 36.00QP 4.00GPA

SPRING 2023

LAW-550	LEGAL ETHICS	02.00	A	08.00
LAW-601	ADMINISTRATIVE LAW	03.00	A	12.00
LAW-643	FEDERAL COURTS	04.00	A	16.00
LAW-691	SEX-BASED DISCRIMINATION	03.00	A	12.00
LAW-719A	HLTHLAW:LEGISLA&REG PROCESS	02.00	A	08.00

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 56.00QP 4.00GPA

FALL 2023

LAW-611	BUSINESS ASSOCIATIONS	04.00	--	--.--
LAW-637	DOMESTIC VIOLENCE	03.00	--	--.--
LAW-707A	THE SUPREME COURT	02.00	--	--.--
LAW-797F	LAW REVIEW II	01.00	--	--.--
LAW-834	PUBLIC HEALTH LAW & POLICY	02.00	--	--.--
LAW-933	CIVIL RIGHTS AND REMEDIES	03.00	--	--.--

LAW CUM SUM: 57.00HRS ATT 55.00HRS ERND 208.00QP 4.00GPA

END OF TRANSCRIPT

May 25, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

With tremendous, heartfelt enthusiasm, I recommend my student and Civil Procedure teaching assistant, Emily Small, for a judicial clerkship in your chambers. Emily is the best of the best at our law school. With her 4.0 GPA, she is at the top of her class. This spring, she received the Highest Grade Designation in my Federal Courts class. She also received Highest Grade Designations in Contracts, Torts, and Legal Rhetoric. She is the recipient of the school's most selective merit-based scholarship. She is senior staffer on the American University Law Review, and her comment will be published in the American University Law Review forum. Emily is a beautiful writer, a brilliant thinker, and a wonderful person. *In fifteen years of teaching, during which I have worked intensively with over a thousand law students, I have not had a better student.*

In her first year, I taught Emily in Civil Procedure. I had a daily deliverable assignment, graded only for completion, on which I gave personalized feedback. Smart students quickly realized this was a resource, and Emily gave it her all with every submission. Because of this, I had ample opportunity to read Emily's writing and interact with her personally. I pride myself on very high standards, and Emily consistently hit it out of the park. She is a beautiful writer and a clear thinker. She can take apart a problem from various angles and has the analytical skills necessary to answer the most nuanced legal questions. On the strength of her performance in my class, I jumped at the opportunity to hire Emily from amongst many applicants to be one of my teaching assistants in her 2L year. I was delighted by her performance last semester. Emily is discreet, responsible, mature, and smart. She anticipated what I needed and got it to me before I articulated that need. She was a real asset in communicating difficult concepts to the anxious 1L students who swarmed her office hours. She has fantastic judgment.

This past semester, I taught Emily in a 67-student section of Federal Courts. I used the Hart & Wechsler textbook and really challenged my students. The class has a well-deserved reputation of being one of the hardest at our law school, and it attracts many stellar students. In this group, Emily was a clear standout. All semester long, her nuanced questions in class and in office hours made clear that she was grasping the material at the very highest level. It was no surprise when I had the "big reveal" after grading all the anonymized exams and found that it was Emily's exam at the very top, five points higher than the next-highest student. She's really that good.

Emily is also a lovely person. She is level-headed and kind. Despite her obvious ability, she has utmost humility. She isn't a gunner and she doesn't have sharp elbows. Quite the contrary, she is someone who has made great friends among her peers.

As a two-time law clerk myself (Judge Patricia Wald on the D.C. Circuit in 1993-1994 and Justice Sandra Day O'Connor in 1994-1995), I know that the judicial workload can be extremely intense and that you need a clerk capable of high performance under pressure. I know that you want someone who is mature and responsible, someone you trust implicitly to do excellent work. Emily is that person. *If I were a judge, I would hire her in a heartbeat.*

Please do not hesitate to contact me should you desire any additional information. My cell phone number is 301-518-6872, and I'd be very happy to sing Emily's praises.

Very sincerely,

Elizabeth Earle Beske

Associate Professor of Law

Elizabeth Beske - beske@wcl.american.edu - 202-274-4302

AMERICAN UNIVERSITY
WASHINGTON, DC

Rebecca Hamilton
Professor of Law

Tel: 202-274-4241
Hamilton@wcl.american.edu

May 17, 2023

To Whom It May Concern

It is my great honor to recommend Emily Small for a clerkship in your chambers. Emily stands out as one of the top five students I have encountered in the past decade of teaching and her application comes with my highest level of recommendation.

I was Emily's professor in Criminal Law in spring 2022, where she received a grade of A (top five percent). This grade was based on class participation, weekly assignments, a multiple choice midterm exam, and an essay-based final exam. Even within the compressed timeframe of the final exam, Emily delivered material that was well written, carefully supported, and clearly organized. As you will see from her transcript, producing this level of quality in her coursework is Emily's norm; she has a 4.0 GPA, and has received highest grade designations across an impressive array of subject areas.

Following her outstanding performance in Criminal Law, I hired Emily as my Teaching Assistant for Criminal Law this spring. I hired her for this position not only because of her outstanding academic performance, but also because of what I had seen of her outside the classroom.

Emily is a member of our flagship journal, The American University Law Review (indeed she already has a publication forthcoming). She is a student leader on campus in the realm of gender justice, and an active member of the Women's Law Association. As my Teaching Assistant, she has exceeded the high expectations that I had of her. My current students look up to her as a trusted mentor. She holds weekly office hours and my confidence in her ability to both help students with the substantive issues in Criminal Law, as well as to guide them through the anxieties of the first year of law school, has proven well founded.

WASHINGTON COLLEGE OF LAW
4300 NEBRASKA AVENUE, NW WASHINGTON, DC 20016
http://www.wcl.american.edu

AMERICAN UNIVERSITY
WASHINGTON, DC

Based on all of these interactions, I am confident that Emily has an extraordinary career ahead of her, and I highly recommend her for your clerkship. Please do not hesitate to contact me with any questions about Emily's application. You can reach me on 202 271 4241.

Yours Sincerely

Rebecca Hamilton

WASHINGTON COLLEGE OF LAW
4300 NEBRASKA AVENUE, NW WASHINGTON, DC 20016
http://www.wcl.american.edu

May 23, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am pleased to recommend Emily Small to be a law clerk in your chambers. Emily worked for me for three years in my Washington, DC office and has my enthusiastic endorsement for this next opportunity. I believe Emily's passion for learning, persuasive writing skills, and strong work ethic would make her an invaluable addition to your chambers.

Emily began as an intern in my Washington, D.C. Office and eventually was promoted to Staff Assistant (SA)/Press Assistant (PA). From the start, Emily impressed the team with her ability to learn quickly and showed initiative by improving the efficiency of a number of office procedures.

As my Staff Assistant, Emily was often the first person constituents interacted with and she did it effectively by providing outstanding service. She also managed the internship program and was an outstanding mentor to aspiring congressional staffers. The pace of a congressional office can be challenging, but Emily always exuded a sense of calm while juggling her many responsibilities. No matter how stressful the situation was, I never doubted her ability to get the job done.

As my staff assistant, one of Emily's main responsibilities was working with my Legislative Correspondent (LC) to draft letters in response to constituent concerns. My office would receive thousands of messages monthly and topics ranged from niche local issues to complex policy discussions. She did an excellent job researching the issues and explaining my positions effectively. She is a very good communicator.

Emily went above and beyond the staff assistant duties, always providing quality work. She never hesitated to take on new assignments.

Emily also worked closely with my Legislative Director (LD) on issues relating to the Democratic Women's Caucus, of which I was a Co-Chair. I know Emily has long shared my passion for helping women and families and her commitment to the cause really shined in her work with the caucus. She and my LD planned executed hearings highlighting the insidious nature of sexual harassment in the workplace. The hearings were a success and effectively highlighted the struggles women are still facing to be treated with dignity and respect.

As she advanced in the office, Emily was given an additional role as my Press Assistant. She worked closely with our Communications Director to draft talking points, social media posts, press releases, and speeches. She never blinked. For example, in one situation, the Communications and Legislative Directors were unable to come to work on the day of a major press conference. Normally, I'd be forced to cancel the event, but Emily stepped up to the plate. She set up the press conference, which included organizing my speaking materials, liaising with the press, coordinating with other offices, and livestreaming the event. She was the most junior member of my team, but she handily managed one of the senior-level responsibilities in my office.

During her three years, Emily never lost sight of the mission. Her passion for her work and helping others was never more apparent than during the COVID-19 pandemic. When stay-at-home orders required staff to work remotely, Emily became the sole link between my constituents and my Capitol office. Her empathy during one of the most stressful moments in recent history was vital to acknowledging and quelling my constituents' anxieties and fears. I am confident Emily will bring the same attention to detail and care that she brought to all her interactions with my constituents to any future endeavor.

I recently retired from Congress after 40 years of public service. Outstanding leaders like Emily make me feel hopeful about our nation's future. She has the passion for learning and the necessary drive to succeed as your law clerk.

Put simply, I highly recommend her.

Sincerely,
Jackie Speier

Emily Small

Washington, D.C. | 847-873-2780 | es2724a@american.edu

Attached is a nine-page portion of an appellate brief I wrote for my Legal Rhetoric: Research and Writing course at American University Washington College of Law. The subject of the brief is the Federal Tort Claims Act. To reduce the length of the document, I have omitted the Statement of Jurisdiction, Statement of the Case, and the Summary of the Argument. The writing is entirely my own.

The following are relevant facts: Harold Hawkins hired an attorney, Vernon Pollard, to handle his claim under the Federal Tort Claims Act (FTCA). Mr. Pollard was on a cruise in 2020 that was unexpectedly placed into mandatory quarantine due to the COVID-19 outbreak. This caused him to be unable to fly home as scheduled. During this time, Mr. Pollard was required to remain in his cabin with no internet connection. Additionally, he was only allowed three phone calls that lasted for three minutes each on every fourth day of quarantine. Each time he called his daughter. When the quarantine was lifted, Mr. Pollard flew home on the first available flight and filed Mr. Hawkins's claim the next day. The district court granted summary judgment for the United States and dismissed the case because Mr. Hawkins' claim was not filed within the FTCA's statute of limitations and did not meet the requisite requirements for equitable tolling. This case takes place within the jurisdiction of the imaginary Twelfth circuit.

[sample begins on the next page]

STATEMENT OF THE ISSUES

I. Under the Federal Tort Claims Act, did the District Court err in granting a Motion for Summary Judgment when Mr. Hawkins diligently pursued his rights by hiring his lawyer within the statute of limitations and had no reason to believe his lawyer was ineffective?

II. Under the Federal Tort Claims Act, did extraordinary circumstances impede Mr. Hawkins' filing when his lawyer was quarantined on a cruise ship for ten days and could not file the claim within the required statute of limitations?

ARGUMENT

STANDARD OF REVIEW

Appellate courts review summary judgment motions de novo. *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). Summary judgment is permissible only if the admissible evidence shows that there is "no genuine issue as to any material fact" and thus the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

I. The Summary Judgment Motion granted by the District Court should be reversed and remanded because Mr. Hawkins' situation clearly allows for equitable tolling.

To successfully bring a claim against the United States under the FTCA the plaintiff must submit an administrative tort claim to the appropriate agency within two years of accruing their cause of action. 28 U.S.C. § 2401(b). However, in 2015, the Supreme Court stated that the FTCA's statute of limitations is subject to equitable tolling. *United States v. Kwai Fun Wong*, 575 U.S. 402, 412 (2015). To determine whether equitable tolling applies in a particular FTCA case, the Twelfth Circuit employs the Supreme Court's test established in *Holland v. Florida*. 560 U.S. 631, 649 (2010). The *Holland* test requires that the litigant asserting a claim for equitable tolling establish two elements: 1) the plaintiff has been pursuing his rights diligently, and 2) some extraordinary circumstance prevented timely filing. *Id.* The Record clearly

demonstrates that Harold Hawkins pursued his rights diligently and extraordinary circumstance prevented his timely filing. R. at 17 (Stip. ¶¶ 1, 4); R. at 18 (Stip. ¶¶ 7, 8, 9, 10, 11); R. at 19 (Stip. ¶ 17).

A. Harold Hawkins pursued his rights diligently because he took steps to investigate his FTCA claim within the statute of limitations, and his lawyer never demonstrated ineffective assistance with his claim.

A person pursues his rights diligently when he takes steps to investigate the claim within the statute of limitations and takes action to replace a lawyer who has demonstrated ineffective assistance with his claim. *See Berdiev v. Garland*, 13 F.4th 1125, 1130 (10th Cir. 2021); *Reid v. United States*, 626 F. App'x 766, 769 (10th Cir. 2015); *Bradley v. NCAA*, 249 F. Supp. 3d. 149, 163 (D.D.C. 2017).

To pursue one's rights diligently, that person must take steps to investigate his claim within the statute of limitations. The court in *Boland v. United States* held that the plaintiff did not pursue her rights diligently when it took at least nine years to establish her claim. 827 F. App'x 336, 337 (4th Cir. 2020) *aff'g* No. 2:18-cv-00113-MSDLRL, 2019 U.S. Dist. LEXIS 229943, at * 17 (E.D. Va. Dec. 11, 2019). Similarly, in *D.J.S.-W. v. United States* the court held that the plaintiff did not diligently pursue her rights when she and her lawyer failed to investigate and find easily discoverable information regarding her doctor's employment status. 962 F.3d 745, 753 (3rd Cir. 2020); *see Farhat v. United States*, No. CIV-19-401-SPS, 2021 U.S. Dist. LEXIS 190474, at *9, *11 (E.D. Okla. Sep. 27, 2001) (holding that diligent research would have easily revealed the existence of a claim within the required statute of limitations); *Bamba v. Fenton*, 758 F. App'x 8, 9 (2nd Cir. 2018) (holding that plaintiff was not diligent by failing to further investigate her claim within 90 days of receiving her right-to-sue letter).

However, the court in *Reid* reversed the district court's ruling of summary judgment and held that the plaintiff pursued his rights diligently when he took steps to investigate his FTCA claim by doing legal research and completing necessary forms within the statute of limitations. 626 F. App'x at 769. The court explained that people often file late in limitations periods, and the plaintiff's choice to begin his investigation late in the allotted period does not indicate a lack of diligently pursuing one's rights. *Id.* Additionally, the court in *Bradley* held that the plaintiff did diligently pursue her rights, despite not meeting the statute of limitations, because she retained medical experts, conducted research, and used reasonable effort in researching and attempting to identify her doctor's employer. 249 F. Supp. 3d. at 163.

For a person to diligently pursue his rights he must also take action to replace a lawyer who has demonstrated ineffective assistance handling his claim. The court in *Berdiev* held that the plaintiff did not pursue his rights diligently when he did not seek out new counsel for three years, despite his lawyer consistently ignoring his calls and requests for information about the case. 13 F.4th at 1130. Similarly, the court in *Esteban-Marcos v. Barr* held that the plaintiff did not pursue her rights diligently when she disapproved of her lawyer's lack of communication and the way he handled her claim, but she did not acquire new counsel for seven years. 821 F. App'x 919, 923 (10th Cir. 2020); *see also Small v. Collins*, 10 F.4th 117, 146 (2nd Cir. 2021) (holding that plaintiff did not do diligently pursue his rights when his lawyer abandoned him, but he did not retain a new attorney within the remaining five months of the statute of limitations).

Conversely, in *Holland*, the Supreme Court held that the plaintiff did pursue his rights diligently when, as soon as he realized he could never get into contact with his court-appointed attorney, he repeatedly requested a new attorney. 560 U.S. at 640. Similarly, the court in *Doe v. Busby* held that the plaintiff pursued his rights diligently when the plaintiff had no reason to

believe his lawyer would not file the petition on time. 661 F.3d 1001, 1013 (9th Cir. 2011). The court emphasized that, without any indication that his lawyer was ineffective, it was reasonable for the plaintiff to assume that his lawyer was going to meet the required deadlines. *Id.* at 1015.

Mr. Hawkins' pursued his rights diligently because he took steps to investigate his FTCA claim within the statute of limitations, and Mr. Pollard never demonstrated ineffective assistance with his claim. Unlike the plaintiffs in *Boland*, *D.J.S.-W.* and *Farhat* who did not do any research or conduct any investigation, and failed to recognize that they had a FTCA claim until after the statute of limitations expired, Mr. Hawkins hired Mr. Pollard four months prior to his statute of limitations deadline specifically because he wanted someone to handle his FTCA claim. *Boland*, 827 F. App'x at 337 (plaintiff failed to discover claim until at least nine years after the malpractice incident); *D.J.S-W*, 962 F.3d at 753 (plaintiff's lawyer did not discover doctor was a federal employee); *Farhat*, 2021 U.S. Dist. LEXIS 190474, at *11 (plaintiff failed to realize he had a claim until after the statute of limitations); R. at 17 (Stip. ¶ 1).

The United States might argue that Mr. Hawkins did not diligently pursue his rights because he waited to hire Mr. Pollard until four months prior to the statute of limitations. However, Mr. Hawkins' timing mirrors the timing in *Reid* where the plaintiff was still diligent even though he did not commence any action until nineteen months into his twenty-four-month statute of limitations period. R. at 17 (Stip. ¶ 1); *Reid*, 626 F. App'x at 769. Following *Reid*, the mere fact that Mr. Hawkins did not hire a lawyer until four months prior to the deadline is not a sufficient basis for a granting of summary judgment. 626 F. App'x at 769.

Additionally, unlike the plaintiffs in *Berdiev*, *Esteban-Marcos*, *Small*, and *Holland* there was no indication that Mr. Pollard demonstrated ineffective assistance with Mr. Hawkins' claim. *Berdiev*, 13 F.4th at 1130 (lawyer consistently ignored plaintiff's calls and requests for

information); *Esteban-Marcos*, 821 F. App'x at 919 (plaintiff knew the lawyer was taking her case in a unfavorable direction); *Small*, 10 F.4th at 146 (plaintiff's lawyer abandoned him); *Holland*, 560 U.S. at 649 (plaintiff's lawyer ignored him). In fact, Mr. Pollard was well-equipped to handle Mr. Hawkins' claim. Mr. Pollard practiced law in Utah since 2002 and handled nearly a dozen FTCA matters. R. at 17 (Stip. ¶ 4). Like the plaintiff in *Doe*, Mr. Hawkins had no reason to doubt Mr. Pollard's ability to be an effective attorney. R. at 17 (Stip. ¶ 4), *Doe*, 661 F.3d at 1013.

Harold Hawkins took steps to investigate his FTCA claim within the statute of limitations, and Mr. Pollard never demonstrated ineffective assistance with his claim. Thus, Mr. Hawkins pursued his rights diligently.

B. Mr. Hawkins demonstrated that extraordinary circumstances prevented timely filing because the quarantine that kept his lawyer from filing his claim was both unforeseeable and beyond both his and his lawyer's control.

A person demonstrates that extraordinary circumstances impede timely filing when the circumstances in question are unforeseeable and beyond the control of the plaintiff and their lawyer. *See Menominee Indian Tribe v. United States*, 577 U.S. 250, 252 (2016) *Boland*, 827 F. App'x at 341, *D.J.S.-W.*, 962 F.3d at 745; *Joseph v. United States*, 505 F. Supp. 3d 977, 981 (N.D. Cal. 2020).

Courts have consistently held that circumstances that are widespread, or common in ordinary life and within the confines of the legal system, do not meet the threshold of being "extraordinary." *Menominee*, 577 U.S. at 252 (holding that litigation costs and limited financial resources are not extraordinary); *see Sweesy v. Sun Life Assurance. Co.*, 643 F. App'x 785, 797 (10th Cir. 2016) (holding that plaintiff's claim of missing her filing deadline due to the death of her elderly and ill father was not extraordinary); *Cook v. United States*, No. 16-CV-555-JED-JFJ,

2019 U.S. Dist. LEXIS 166259, at *9 (N.D. Okla. Sep. 27, 2019) (holding that a plaintiff's financial constraints and difficulty finding an expert witness were not extraordinary); *Watson v. United States*, 865 F.3d 123, 132 (2nd Cir. 2017) (holding that lack of education, pro se status, or ignorance of the right to bring a claim are not extraordinary).

Conversely, extraordinary circumstances did occur when the unprecedented COVID-19 pandemic disrupted plaintiffs' ability to manage their claims. *See Joseph*, 505 F. Supp. 3d at 977 (finding it extraordinary when the COVID-19 pandemic stay-at-home orders made it extremely difficult for plaintiff to find a lawyer within the statute of limitations); *Johnson v. Rewerts*, No. 2:20-CV-12165, 2021 U.S. Dist. LEXIS 173635, at *1, *3 (E.D. Mich. Sep. 14, 2021) (holding that prison lockdowns and law library shutdowns implemented to combat COVID-19 were extraordinary circumstances that impeded timely filing). Similarly, the court in *Dunn v. Baca* held that the COVID-19 pandemic was an extraordinary circumstance because lawyers, who are otherwise acting diligently, may be forced to miss their deadlines due to technical difficulties arising from teleworking, and the sudden need for lawyers to care for their children. No. 3:19-cv-00702-MMD-WGC, 2020 U.S. Dist. LEXIS 86453, at *4 (D. Nev. May 18, 2020).

For a court to find that extraordinary circumstances impeded timely filing of an administrative claim, the circumstances must also be beyond the control of the plaintiff or their lawyer. *See Barnes v. United States*, 776 F.3d 1134, 1151 (10th Cir. 2015) (holding that plaintiffs were not entitled to equitable tolling when they gave no explanation for filing late); *Menominee Indian Tribe*, 577 U.S. at 250; *D.J.S-W*, 962 F.3d at 753 (holding that a lawyer's inability to determine that defendant was a federal employee was not extraordinary because the information was discoverable through reasonable means of investigation). In *DeLia v. U.S. Department of Justice*, the court held that while COVID-19 is beyond a plaintiff's control it was

not justified as an extraordinary circumstance when the plaintiff failed to demonstrate how the pandemic prevented him from contacting the court, whose clerk's office continued normal operations. No. 21-5047, 2021 U.S. App. LEXIS 28311, at *10 (10th Cir. Sep. 20, 2021). Additionally, the *Small* court held that even when circumstances are beyond a plaintiff's control, if they have time to remedy the situation, the circumstances are not extraordinary. 10 F.4th at 121 (finding a lawyer's abandonment of her client was not extraordinary when the plaintiff had five months to hire new counsel and file the claim); *see Flud v. United States ex rel. Dep't of Veteran Affairs*, 23 F. Supp. 3d 1352, 1357 (N.D. Okla. 2014) (holding that plaintiff's choice not to consult a lawyer about his misdiagnosed claim was in his control and not an extraordinary circumstance); *Boland*, 827 F. App'x at 337 (holding that plaintiff's own decision caused the delay in litigation, and was not extraordinary); *Sigala v. Bravo*, 656 F.3d 1125, 1128 (10th Cir. 2011) (finding no extraordinary circumstances when counsel never informed plaintiff of an amended judgment because plaintiff never proactively contacted his defense counsel or the court).

Conversely, in *Holland* the Supreme Court found extraordinary circumstances when, despite the plaintiff doing everything in his power to communicate with his lawyer, his lawyer would not respond. 560 U.S. at 649. Similarly, in *Maples v. Thomas* the Supreme Court held that when the plaintiff was abandoned by his attorney at a critical moment, and was unaware that he was unrepresented, the circumstances were extraordinary. 565 U.S. 266, 289 (2012). Courts have also found extraordinary circumstances when administrative processes beyond the plaintiff's control delay their complaint. *See Bradley*, 249 F. Supp. 3d at 149 (finding an extraordinary circumstance when plaintiff could not ascertain her doctor's employer because the connection between the doctor and the federal government was contractually and purposefully concealed);

Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1053 (9th Cir. 2013) (finding extraordinary circumstances when delays within the court's system caused plaintiff to miss her deadline).

In Mr. Hawkins' case, a court would find that the COVID-19 mandated quarantine on Mr. Pollard's cruise ship was an extraordinary circumstance because it was unforeseeable, and entirely out of Mr. Hawkins' and Mr. Pollard's control. Unlike the circumstances in *Menominee Indian Tribe*, *Cook*, *Watson*, and *Sweesy*, mandatory quarantine is not a regular occurrence or something that occurs often in daily life. *Menominee*, 577 U.S. at 252 (significant costs to litigation are not extraordinary); *Cook*, 2019 U.S. Dist. LEXIS 166259, at *3 (financial constraints are not extraordinary); *Watson*, 865 F.3d at 123 (lack of education is not extraordinary); *Sweesy*, 643 F. App'x at 797 (death of father with Alzheimer's not extraordinary); R. at 18 (Stip. ¶¶ 6,7,8,9).

Mr. Pollard's situation is similar to the situation in *Joseph* where the court emphasized that the "current restrictions on civil and personal life" due to the COVID-19 public health crisis were an extraordinary circumstance. 505 F. Supp. 3d at 907; R. at 18 (Stip. ¶¶ 6, 7, 8, 9). The unexpected, mandated quarantine is similar to the unexpected shutdown of the library due to COVID-19 that kept the plaintiff in *Johnson* from filing on time. 2021 U.S. Dist. LEXIS 173635, at *3; R. at 18 (Stip. ¶ 8). A court would also find that Mr. Pollard's mandated quarantine was beyond the control of either Mr. Hawkins or Mr. Pollard. Unlike the plaintiffs in *Barnes*, Mr. Hawkins can demonstrate how COVID-19 directly caused him to file his claim past the statute of limitations. *See Barnes*, 776 F.3d at 1151; R. at 19 (Stip. ¶ 17). Moreover, while in quarantine, Mr. Pollard did not have proper phone or internet access to reach his client or the administrative agency he was going to use to file the claim. R. at 18 (Stip. ¶ 9). This contrasts with the facts in *DeLia* where the court held that the COVID-19 pandemic did not constitute an extraordinary

circumstance when the administrative processes to submit a claim remained available during the onset of the pandemic. 2021 U.S. App. LEXIS 28311, at *1.

Mr. Hawkins' situation also differs from the plaintiff's situations in *Small*, *Flud,* and *Sigala*. *Small* 10 F.4th at 146 (abandoned by lawyer with five months to find replacement); *Flud*, 23 F. Supp. 3d at 1357 (plaintiff chose not to call lawyer); *Sigala*, 656 F.3d at 1128 (nothing prevented plaintiff from calling lawyer). In Mr. Hawkins' case, he neither knew that his lawyer was quarantined on a ship and was unable to file the claim, nor could he have likely found a new lawyer within the statute of limitations. R. at 18 (Stip. ¶ 6). Furthermore, unlike the plaintiff in *Boland*, Mr. Hawkins did not personally make any decision that delayed filing the claim; it was the sole consequence of Mr. Pollard's mandated quarantine. *Boland*, 827 F. App'x at 337; R. at 19 (Stip. ¶ 17). Mr. Hawkins' situation is most similar to the plaintiff's situation in *Maples* because the mandated quarantine occurred within the last eight days of the statute of limitations making it an extremely critical point in Mr. Hawkins' filing process. *Maples*, 565 U.S. at 270 (plaintiff abandoned at critical time); R. at 18 (Stip. ¶¶ 6,7,8,9).

The ten-day mandated quarantine that forced Mr. Pollard to file Mr. Hawkins' FTCA claim past the statute of limitations was an extraordinary circumstance because it was unforeseeable and beyond the control of both Mr. Hawkins and Mr. Pollard.

Applicant Details

First Name	**Catherine**
Last Name	**Walker-Jacks**
Citizenship Status	**U. S. Citizen**
Email Address	**cwalkerjacks@jd23.law.harvard.edu**
Address	**Address** Street **371 Harvard Street Apt 4A** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**8576369208**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Journal of Sports and Entertainment Law** **Harvard Law and Policy Review** **Civil Rights-Civil Liberties Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Jackson, Vicki
vjackson@law.harvard.edu
617-496-0555
Grossi, Peter
ptgrossi47@gmail.com
Schwartztol, Larry
lschwartztol@law.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.